August 07, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am writing to you on behalf of Mr. Stefan Pruessmann, who is applying for a federal judicial clerkship. I have been in the legal profession for eight years, as a judicial clerk for the Hon. Marcia Phillips Parsons, an associate attorney, and now a legal writing instructor and the Assistant Director of Legal Research and Writing at Vanderbilt University Law School. I highly recommend Mr. Pruessmann for a judicial clerkship.

During the 2021-22 academic year Mr. Pruessmann was a student in my Legal Writing I and II classes, the traditional first year legal research and writing classes. Although Mr. Pruessmann struggled in the early part of fall 2021, he quickly found his footing and excelled. By the end of the Spring 2022 semester, Mr. Pruessmann was one of my best students, and received the second-highest score on his Appellate Brief. With the small class-sizes of Vanderbilt's legal writing sections, Mr. Pruessmann's ability to move from an A- in the fall to an A in the spring, with the second-highest overall score in his class, is truly impressive, and not something I often see. Mr. Pruessmann has demonstrated the ability to accept and absorb constructive criticism without taking it personally, and he used my early written and verbal feedback to move from the bottom of the class after the first graded assignment, to the top of the class after the final graded assignment in the fall.

In the classroom setting, Mr. Pruessmann consistently offered valuable insights and demonstrated his thorough preparation. He also demonstrated an ability to work well with others, collaborating with his classmates during group work and conducting himself with professionalism. In one-on-one meetings, Mr. Pruessmann always asked thoughtful questions about the material and demonstrated a thorough understanding of the law. He also pays close attention to detail, and would notice things in the writing assignment prompt or record that other students did not, using those details to help strengthen his legal argument. This attention to detail was also reflected in his bluebook and formatting scores, which were always high. As surprising as it may seem, this attention to detail was also evident in the fact that Mr. Pruessmann was also one of the few students to routinely submit papers free from typographical errors. I very much enjoyed working with Mr. Pruessmann during the 2020-21 school year, finding him to be an exemplary student, and believe he will excel as a judicial clerk.

I am confident that Mr. Pruessmann's analytical skills, coupled with his eagerness to learn and improve, would be an asset to your chambers. If I can be of further assistance, please feel free to contact me either via telephone, (203) 232-0773, or e-mail, amy.enix@vanderbilt.edu.

Best regards,

Amy Bergamo Enix
Instructor of Law
Assistant Director of Legal Research & Writing
Vanderbilt University Law School

August 07, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

It is my great pleasure to write this letter in support of Stefan Pruessmann's application for a judicial clerkship. Stefan was my student in the spring of 2022 in first-year Property, which had an enrollment of fifty-three. In classroom discussion, conversations during office hours, and at screenings of property-related movies that I organized all spring, I got to know Stefan well. He stood out for his stellar legal mind, intellectual curiosity, and boundless enthusiasm. I am confident that he will be a superb law clerk.

In Property, Stefan performed brilliantly. He volunteered often in class, and I found that I consistently learned from his incisive, thoughtful, and even witty comments about doctrine and policy questions. He frequently visited office hours and sent me terrific links to current news stories dealing with concepts that we were learning in class. His exam was one of the top seven exams in the class, a high A- on our uncompromising grading curve. It was a tightly argued set of essays about a statute allowing affordable housing uses to nullify residential covenants and about a recent case involving a proposal to use private eminent domain to run a gas pipeline through a Memphis neighborhood that had been founded after the Civil War by Black army veterans and their families. Stefan showed excellent command of a broad range of property doctrines and theoretical concepts, and in just about any other year his exam would have been an A. He identified key issues; his analysis was sharp and thickly textured; and his writing was clear.

Based on his performance in Property, I am entirely unsurprised that Stefan is having a stellar career at Vanderbilt. He has excellent grades, with a particularly notable spring 1L term (the most difficult and demanding semester at Vanderbilt). While his grades took a small dip this past fall while he was figuring out how to manage his schoolwork alongside Law Review, he bounced back in the spring with some of his best grades. He also participates robustly in a wide range of extracurriculars, including the Law Review as Managing Authorities Editor as well as the Asian Pacific Law Students Association (Stefan is part Filipino and in college wrote his senior thesis about the historical memory of the Marcos years, an area of expertise that became highly relevant during the recent presidential election), Vanderbilt's organization for first-generation law students, and our club for law student runners. Last summer, he did an externship with the district attorney's office in Atlanta, and this summer, he is a judicial intern for the Hon. Curtis Collier in the U.S. District Court in Chattanooga. Eventually he hopes to have a career doing litigation and appellate work in Washington, D.C. The delight Stefan takes in studying law and being a part of Vanderbilt's intellectual community is evident. The quality of his work and the way he is thriving here lead me to believe that as a law clerk, he will be someone whom a judge can trust to handle any case, big or small, with superior skill, sensitivity, and, above all, judgment.

Stefan's legal and intellectual talents are matched by his lovely personal qualities. He is a happy and optimistic person who has real intellectual curiosity while remaining appealingly down to earth. While the spring term of the first year can be a pressure cooker, a time when many students lose perspective, Stefan rose to the moment, unruffled and with his terrific sense of humor very much intact. When I organized extracurricular, entirely voluntary screenings of property-related movies throughout the spring term, Stefan helped suggest films and actively participated in wonderful conversations afterwards. In fact, I have enjoyed every conversation I have had with him. Based on my own experience as a law clerk, I know that Stefan will be a true joy to have in chambers—someone who is excellent at his job and a gem of a colleague. I give him my highest recommendation, with no reservations. If you would like to talk more about Stefan, please do not hesitate to contact me by phone, 615-322-1890, or by email, daniel.sharfstein@vanderbilt.edu.

Sincerely

Daniel J. Sharfstein

Dick and Martha Lansden Professor Law and Professor of History
Director, George Barrett Social Justice Program

Kevin Armstrong
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, Third Floor
Atlanta, Georgia 30303

February 17, 2023

I am the deputy district attorney who supervises the Appeals Unit for the largest prosecutor's office in the State of Georgia. Mr. Stefan A. Pruessmann worked under my supervision as an intern for the Appeals Unit for one-half of the summer of 2022.

My direct exposure with Mr. Pruessmann's work product is somewhat limited. However, that work product I did encounter was very good for a law student between their first and second years. The reason my exposure to Mr. Pruessmann's work product is limited is because he did work for the unit generally and not just for me specifically. I have spoken with two other attorneys for whom Mr. Pruessmann performed work, and each has responded positively.

On such attorney wrote:

> Mr. Pruessmann assisted me with drafting responses and proposed orders on several pro se cases. He did a good job—his work was accurate, he asked pertinent questions and sought clarification where needed, and he produced the work when I needed it. It was a pleasure to work with him and I would definitely work with him again.

Another wrote:

> Stefan undertook a legal research project at my request and timely provided a detailed report of his findings, which I used in drafting a response to a pro so motion for new trial.
>
> His research was focused and yielded citations to several key authorities relevant to the question at hand. His analysis was cogent and showed an appreciation for the granular details of each case as well as the big picture.

Moreover, it should be noted that Mr. Pruessmann did not simply wait around to be assigned work; when he was available to do additional work, he showed initiative and actively sought out additional assignments.

Interpersonally, I interacted with Mr. Pruessman on a daily or near-daily basis. I find him to be good-natured, respectful, and an enjoyable person to work with in a legal setting.

I would recommend Mr. Pruessman for future internships or clerkships.

Sincerely,

Kevin Armstrong

Stefan Pruessmann

MEMORANDUM AND RECOMMENDATION

Before the Court is a motion for summary judgment by Defendant Walmart Inc. ("Walmart") (Docs. 81, 82). Plaintiff responded in opposition (Doc. 93), Walmart replied (Doc. 94), and Plaintiff filed a sur-reply (Doc. 101). The matter is now ripe for review.

I. BACKGROUND[1]

On or about May 17, 2020, Plaintiff's boyfriend Martrel Usher purchased a bucket candle with three wicks at a Walmart store. (Doc. 92 at 1.) This candle was manufactured by Defendant Home Essentials Brands. (*Id.*) On or about May 24, 2020, Plaintiff lit the candle on her front porch. (Doc. 93 at 2.) Plaintiff did not read the warnings on the candle before lighting it, thinking it would function like a normal candle. (Doc. 81-1 at 20–21.) Plaintiff observed the candle "flaming up" like "a small campfire" while "the wax was boiling." (Doc. 92-1 at 12.) After letting the candle burn for several hours (Doc. 28-2 at ¶ 4), Plaintiff eventually fell asleep on the porch with the candle burning. (Doc. 81-1 at 24.) Plaintiff was awoken when she heard a "boom" and saw her clothes burning, sustaining burns on her right arm and leg from candle wax, which she alleges was the result of the candle exploding. (*Id.* at 24–26.) Her family took her to the hospital, with Mr. Usher disposing of the candle in the garbage at some point. (*Id.* at 46–48; Doc. 92 at 3.)

At some point shortly after the accident, Plaintiff's counsel obtained a candle with the same Universal Product Code ("UPC") from the same Walmart where Plaintiff purchased the original candle. (Doc. 87 at 4.) This candle ("Same-UPC Candle") was later provided to Plaintiff's Rule 26 expert Charles Coones, a "certified fire and explosion investigator," to test along with other

[1] Factual disputes and reasonable inferences regarding the underlying facts are presented in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

candles with similar appearances and UPCs ("Similar-UPC Candles"). (Doc. 113 at 2.) Mr. Coones tested the similar UPC candles by burning them with added adulterants to replicate the candle behavior described by Plaintiff, without success. (Doc. 87-4 at 1–2.) Mr. Coones also conducted Fourier Transform Infrared spectroscopy on the Same-UPC Candle and the Similar-UPC Candles and found "a much higher quantity" of combustible oils in the Same-UPC Candle. (*Id.* at 1–2, 9.)

On June 30, 2021, Plaintiff filed her second amended complaint suing Walmart and Defendant Home Essentials Brands. (Doc. 6 at 1.) She brings claims of (1) negligence, (2) strict liability for defective product design and manufacture, (3) strict liability for failure to warn, (4) unjust enrichment, (5) breach of the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101 *et seq.*, and (6) breach of the Tennessee Products Liability Act, Tenn. Code Ann. §§ 29-28-101 *et seq.* (*Id.* at 8–27.) She seeks three million dollars of compensatory damages for her injuries and missed time from work as well as punitive damages. (*Id.* at 27.)

On April 11, 2022, Walmart filed a motion for summary judgment claiming (1) Plaintiff's Tennessee Products Liability Act ("TPLA") claim is barred by the TPLA, (2) she could not establish a prima facie claim under the TPLA if her claim was not barred, (3) she cannot recover for her claimed injuries under the Tennessee Consumer Protection Act ("TCPA"), (4) she has no evidence of acts or practices by Walmart violating the TCPA, (5) her claim for punitive damages is barred due to Walmart's seller status, and (6) Plaintiff is at least fifty percent at fault for her accident. (Doc. 81 at 1–2.)

II. STANDARD OF REVIEW

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). The moving party bears the burden of showing no genuine issue of material fact remains. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003).

If the moving party meets its initial burden, "the non-moving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). A genuine issue for trial exists if there is "evidence on which the jury could reasonably find for the plaintiff." *Rodgers v. Banks*, 344 F.3d 587, 595 (6th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)) (internal quotations omitted). In addition, should the nonmoving party fail to provide evidence to support an essential element of its case, the movant can meet its burden by pointing out such failure to the court. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

At summary judgment, the court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the nonmovant. *Anderson*, 477 U.S. at 248–49. The court should view the evidence, including all reasonable inferences, in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587; *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). If the court concludes, based on the record, that a fair-minded jury could not return a verdict in favor of the nonmovant, the court should grant summary judgment. *Anderson*, 477 U.S. at 251–52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

III. DISCUSSION

Walmart seeks to dismiss Plaintiff's claims on several grounds: barring of her claims by the TPLA and inability to satisfy the TPLA's burden of proof; lack of a viable TCPA claim; failure

to meet the statutory requirements for her punitive damages claim; and inability to recover under Tennessee's modified comparative fault system.

A. Tennessee Products Liability Act

Under the TPLA, product liability actions against non-manufacturer sellers of products are barred unless one of five exceptions is satisfied. *See* TENN. CODE ANN. § 29-28-106. Plaintiff has admitted the candle was manufactured by Defendant Home Essentials Brands and purchased from Walmart (Doc. 92 at 1), so there is no genuine dispute regarding Walmart's status as a seller. *See* TENN. CODE ANN. § 29-28-102. The product liability action requirement is also satisfied, as Plaintiff stated "[t]his case is a products liability case that resulted in a personal injury" (Doc. 93 at 11), falling within the TPLA's definition of a "product liability action." TENN. CODE ANN. § 29-28-102(6).

Of the five exceptions permitting a product liability action against a seller, both parties only substantively discuss one. (Doc. 93 at 4–7; Doc. 94 at 2–3.) The relevant exception requires the seller to "exercise[] substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the alleged harm for which recovery of damages is sought." TENN. CODE ANN. § 29-28-106(1). Walmart argues Plaintiff has failed to establish any of the exceptions to permit her claim and could not establish a prima facie TPLA claim if it is not barred. (Doc. 82 at 5–8.) Plaintiff argues Walmart exercised substantial control over multiple aspects of the candle, particularly design, testing, and manufacture, which in sum created the candle that allegedly exploded. (Doc. 101 at 2–3.)

1. Whether Seller Exercises Substantial Control

First, Walmart argues Plaintiff has failed to establish Walmart exercised substantial control over "that aspect . . . of the product that caused the alleged harm for which recovery of damages is

sought." (Doc. 94 at 2–3.) Walmart notes the statute specifies "that aspect . . . that caused the alleged harm," and says Plaintiff primarily makes general claims about Walmart's control over the candle without noting which aspect caused the accident. (*Id.*) Walmart addresses Plaintiff's argument blaming the accident on the candle's chemical composition by claiming a lack of evidence for both the chemical composition of the original accident candle and Walmart's exercise of substantial control over the candle's chemical composition. (*Id.* at 3.)

Plaintiff argues Walmart exercised substantial control over the testing, labeling, design, and manufacture of the candle which allegedly exploded onto Plaintiff. (Doc. 93 at 4–6.) Plaintiff cites deposition testimony in which a Home Essentials Brands executive discusses Walmart's testing requirements for candles from Home Essentials Brands, including pre- and post-production third-party testing. (*Id.* at 4–5.) Walmart hires outside agencies to test candles before production begins and after they are sold to the public. (*Id.*) Plaintiff also uses the deposition to establish Walmart's control over labelling, as it mentions the "collaboration" between Home Essentials and Walmart to ensure the candle labels comply with industry requirements. (*Id.* at 5–6; Doc. 93-2 at 4.) Plaintiff then claims Walmart substantially controls the manufacture of the candle based on a Home Essentials interrogatory response stating Walmart annually tests and audits the Chinese facility producing the candles for safety and industry compliance. (Doc. 93 at 6; Doc. 93-4 at 2.) Lastly, Plaintiff claims Walmart controlled the candle's design and makeup, pointing to Walmart's involvement in determination of the candle's wick size. (Doc. 93 at 6.) Walmart had wind resistance requirements for candle wicks, but when Home Essentials viewed compliant wicks as too large to be safe to burn, Walmart gave them an exception. (Doc. 93-3 at 4.) Besides wick size, Plaintiff also claims Walmart controlled which ingredients were used for the candles, although the

documents cited do not discuss wax ingredients. (Doc. 93 at 6; Doc. 96; Doc. 96-1; Doc. 96-2; Doc. 96-3; Doc. 96-4.)

Plaintiff does not explicitly attribute the candle's alleged explosion to any of the above factors individually, instead arguing the candle's explosion proves its defectiveness and Walmart's control over multiple aspects of production of the allegedly flawed candle open it to liability under the TPLA. (Doc. 93 at 6.) In Plaintiff's view, the alleged explosion establishes the flawed nature of the candle, and Walmart substantially controlled all the aspects which were part of the allegedly flawed candle's creation (design, testing, manufacture, and labeling), so the substantial control exception was satisfied without stating which aspect caused the alleged explosion. (Doc. 101 at 2.)

When dealing with TPLA exceptions, the Court has not responded kindly to failures to provide a causal link between alleged harms and alleged control of a product's creation. *See Grant v. Kia Motors Corp.*, 185 F. Supp. 3d 1033, 1040–41 (E.D. Tenn. 2016) ("Plaintiffs have failed to establish that any of the documents 'caused the alleged harm for which recovery of damages is sought.' While [Plaintiffs] arguably allege[] that the documents may have caused their harm, Plaintiffs have failed to set forth any evidence . . . to support such a theory."). Plaintiff references test failures by candles within the same product line, but these test failures appear unrelated to the candle's alleged explosion. (Doc. 101 at 2.) Of the three failures cited, all involved labels being too small by several millimeters (which Plaintiff admitted to not reading), and one involved a wick falling over and self-extinguishing after burning for thirty-one hours. (Doc. 96-2 at 1; Doc. 96-3 at 1–2; Doc. 96-4 at 1.) For comparison, Plaintiff's candle burned for several hours before allegedly exploding. (Doc. 28-2 at ¶ 4.)

Plaintiff does separately allege the candle had higher levels of combustible oils than candles currently sold by Walmart, indicating the candle's chemical composition contributed to the alleged explosion. (Doc. 93 at 9.) This is based on chemical testing performed by Plaintiff's Rule 26 expert on a candle of the same model with the same UPC purchased soon after the accident from the Walmart which sold the original candle. (Doc. 87-4 at 1–2; 87 at 4.) Walmart disputes the validity of using the tested candle to stand in for the original candle, but this is a factual dispute for the jury. (Doc. 94 at 1–2.) As Plaintiff has alleged the candle had high levels of combustible oil which at least partially contributed to the alleged explosion, and that Walmart substantially controlled the design and manufacture of said candle, Plaintiff's TPLA claim is not barred at this stage.

2. Unreasonably Dangerous or Defective Candle

As Plaintiff's claim is not barred by the TPLA, the Court must determine whether Plaintiff can establish a prima facie claim under the TPLA by showing the candle (1) was in a defective condition or unreasonably dangerous when it left Walmart's control and (2) was the proximate cause of her injuries. TENN. CODE ANN. § 29-28-105(a); *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 483 (6th Cir. 2008). The TPLA defines "defective condition" as "a condition of a product that renders it unsafe for normal or anticipatable handling and consumption," and "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." TENN. CODE ANN. § 29-28-102. There are two tests in Tennessee for determining whether a product is unreasonably dangerous: the consumer expectation test and the prudent manufacturer test. *Ray by Holman v. BIC Corp.*, 925 S.W.2d 527, 529–30 (Tenn. 1996). These tests are not exclusive, and either or both are applicable to cases with allegations of unreasonably

dangerous products. *Jackson v. Gen. Motors Corp.*, 60 S.W.3d 800, 806 (Tenn. 2001). The consumer expectation test requires a plaintiff to show "that the product's performance was below reasonable minimum safety expectations of the ordinary consumer having ordinary, 'common' knowledge as to its characteristics." *Id.* This test "entails a showing by the plaintiff that prolonged use, knowledge, or familiarity of the product's performance by consumers is sufficient to allow consumers to form reasonable expectations of the product's safety." *Id.* The parties do not discuss the prudent manufacturer test beyond mentioning it, so this memo will focus on the consumer expectation test. (Doc. 82 at 7–8; Doc. 93 at 7.)

Walmart's arguments regarding the consumer expectation test's applicability to this case are limited. (Doc. 82 at 7–8.) Walmart cites *Ray by Holman*'s statement that under the test, "a product is not unreasonably dangerous if the ordinary consumer would appreciate the condition of the product and the risk of injury." 925 S.W.2d at 530. Walmart also notes Plaintiff's failure to observe the alleged explosion. (Doc. 82 at 8.)

Plaintiff argues "[a]n ordinary consumer would expect a candle to burn down at a normal speed and temperature and would expect that candle [to] eventually burn down and out" if handled properly, rather than exploding. (Doc. 93 at 8.) Instead of burning like a "regular candle" as Plaintiff expected, the candle allegedly exploded. (*Id.*) Plaintiff argues a jury could find the candle failed to meet ordinary safety expectations given her handling of the candle, making summary judgment inappropriate. (*Id.*)

Consumers generally do not expect candles to expel hot wax on them when handled properly, much less explode. While candles are not harmless, it is unclear what condition of the candle or risk of injury Walmart believes Plaintiff and ordinary consumers should appreciate in this case. (Doc. 82 at 7–8.) Plaintiff did not wake up to find a fire spread by the unmonitored

candle, she was allegedly awoken by splatters of hot wax. (Doc. 93 at 8.) And there is no indication Plaintiff made the candle unreasonably dangerous after she purchased it through "improper maintenance or abnormal use." TENN. CODE ANN. § 29-28-108. Walmart later emphasizes Plaintiff's failure to read the candle's warnings, her disregard of odd flame behavior, and her unconscious state, but a causal relationship between these facts and the candle's alleged explosion is not apparent. (Doc. 82 at 12–13.) Plaintiff has pled sufficient facts to allow a reasonable jury to find for Plaintiff under the consumer expectation test, making summary judgment inappropriate at this stage. Walmart and Plaintiff also disagree as to whether Plaintiff can prove the candle was defective when it left Walmart's control, but Plaintiff's ability to potentially establish the candle's unreasonable dangerousness for a jury makes consideration of this alternate approach unnecessary. (*Id.* at 7–8; Doc. 93 at 8–9. Accordingly, the Court should deny Walmart's motion for summary judgment as to Plaintiff's TPLA claim.

Next, this memo will address the merits of Walmart's motion for summary judgment as to Plaintiff's TCPA claim.

B. Tennessee Consumer Protection Act

Under the TCPA, anyone who "suffers an ascertainable loss of money or property . . . as a result of the use or employment by another person of an unfair or deceptive act or practice described in § 47-18-104(b) and declared to be unlawful by this part" may file suit to recover actual damages. TENN. CODE. ANN. § 47-18-109. Claims for personal injuries stemming from products which allegedly violate the TCPA are not permitted and must be dismissed. *See, e.g.*, *Orr v. Ethicon, Inc*., No. 2:20-CV-110-TAV-HBG, 2020 WL 9073528, at *3 (E.D. Tenn. Sept. 11, 2020) (quoting *Riddle v. Lowe's Home Ctrs., Inc*., 802 F. Supp. 2d 900, 909 (M.D. Tenn. 2011));

McElroy v. Amylin Pharms., Inc., No. 1:12-CV-297, 2013 WL 12099073, at *8 (E.D. Tenn. Aug. 5, 2013) (quoting *Riddle*, 802 F. Supp. 2d at 909)).

Walmart argues Plaintiff's TCPA claim is not permitted as a personal injury claim and could not succeed if permitted due to a failure to identify an unfair or deceptive practice by Walmart. (Doc. 82 at 8–10.) Plaintiff argues her claim is not a personal injury claim and that Walmart was deceptive when it sold defective candles as if they were safe. (Doc. 93 at 10–12.)

1. Permissibility of TCPA Claim

Walmart argues Plaintiff's TCPA claim is not permitted as almost all of her claimed damages stemmed from an alleged personal injury. (Doc. 82 at 9–10.) Several cases involving dismissals of TCPA claims for damages related to personal injuries caused by products, rather than ascertainable losses of money or property unrelated to personal injuries, are cited. *E.g.*, *Fleming v. Janssen Pharms., Inc.*, 186 F. Supp. 3d 826, 834 (W.D. Tenn. 2016) (dismissing a TCPA claim for economic damages directly linked with a purchased diabetes drug); *Riddle*, 802 F. Supp. 2d at 909 (dismissing a TCPA claim for lost income and medical expenses stemming from personal injuries). Walmart lists Plaintiff's claimed damages in the Second Amended Complaint (Doc. 6), which include physical injury, work missed, medical expenses, and the candle's cost, and argues only the candle's cost is unrelated to Plaintiff's alleged personal injury. (Doc. 82 at 10.) Walmart then argues even this is insufficient as Plaintiff testified that she did not purchase the candle, meaning she did not suffer a loss from purchasing the candle. (*Id.*)

Plaintiff notes that the aforementioned cases cited by Walmart were recently distinguished. (Doc. 93 at 11.) In *Young v. Black & Decker (U.S.), Inc.*, 533 F. Supp. 3d 578 (M.D. Tenn. 2021), the court permitted a TCPA claim for the value of the saw purchased by the plaintiff as it was separate from any personal injuries. 533 F. Supp. 3d at 581–82. Plaintiff describes her case as not

arising "solely from the personal injuries she sustained as a result of the exploding candle but . . . a products liability case in which the personal injuries are a result." (Doc. 93 at 12.) In Plaintiff's view, since she and her boyfriend purchased the candle, her claim for "damages to her personal property as well as for the loss of the value of the candle that were sustained from Defendant Walmart's misconduct" should be permitted to continue. (*Id.*)

Walmart responds that Plaintiff's TCPA claim is only partially analogous to *Young*. (Doc. 94 at 4.) In *Young*, the plaintiff alleged that the defendant's violation of the TCPA caused damage to the saw he purchased which made it "inoperable and valueless," a loss which he claimed in addition to personal injuries suffered as a result of using the saw. 533 F. Supp. 3d at 581. The court found this to be an "ascertainable loss of . . . property . . . or [a] thing of value" under the TCPA. *Id.* Walmart then notes the *Young* plaintiff's purchase of the saw was undisputed, unlike Plaintiff's purchase of the candle. (Doc. 94 at 4.)

Plaintiff appears to seek to use her alleged purchase of the candle as a Trojan horse to include her claims for personal injury: "[a]s in *Young*, the Plaintiff seeks damages to her personal property as well as for the loss of the value of the candle that were sustained from Defendant Walmart's misconduct." (Doc. 93 at 12.) The court in *Young* refused to dismiss the complaint because it sought the value of the saw under the TCPA "notwithstanding [an] inartful prayer for relief" which appeared to also seek damages for personal injury under the TCPA. 533 F. Supp. 3d at 582. Here, Plaintiff attaches her claims for "damages to her personal property" to her claim for "the loss of the value of the candle." (Doc. 93 at 12.) There are no cases where a valid TCPA claim cleansed impermissible TCPA claims. As such, only her claim for the value of the candle she allegedly purchased is permitted under the TCPA.

Additionally, it appears Plaintiff did not even purchase the claimed candle. Plaintiff's response to Walmart's motion for summary judgment states "[t]he Plaintiff and her boyfriend purchased the candle," (*Id.*) but she admits in her responses to Walmart's statement of material facts that her boyfriend purchased the candle, rather than making a joint purchase. (Doc. 92 at 1.) When asked in her deposition "who was with [her] when [she] purchased the candle," Plaintiff responded "[my boyfriend, h]e purchased the candle." (Doc. 97-2 at 18.) Since Plaintiff's boyfriend purchased the candle, it is unclear what ascertainable loss of money or property Plaintiff suffered that is unrelated to her alleged personal injuries. In *Gant*, the Tennessee Court of Appeals affirmed the dismissal of a TCPA claim since the plaintiff's relative purchased the relevant product, rather than the plaintiff. *Gant v. Santa Clarita Lab'ys*, No. M2005-01819-COA-R3-CV, 2007 WL 1048948, at *1–2 (Tenn. Ct. App. Apr. 5, 2007). As such, Plaintiff's TCPA claim must be dismissed, and there is no need to analyze Plaintiff's arguments regarding Walmart's alleged deceptiveness under the TCPA. Accordingly, the Court should grant Walmart's motion for summary judgment as to Plaintiff's TCPA claim.

Next, this memo will address the merits of Walmart's motion for summary judgment as to Plaintiff's claim for punitive damages.

C. Punitive Damages Under Statute

In a statute nigh identical to the TPLA section discussed above, Tennessee only permits sellers to be held liable for punitive damages unless one of three exceptions applies. TENN. CODE ANN. § 29-39-104(c). The first exception, when a seller "exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought," mirrors the TPLA exception discussed above. *Id.*; TENN. CODE ANN. § 29-28-106. Unsurprisingly, Walmart and Plaintiff's arguments also mirror

their prior arguments regarding substantial control. (Doc. 82 at 11; Doc. 93 at 12–13; Doc. 94 at 5; Doc. 101 at 3.) As Plaintiff's TPLA claim is not barred for reasons outlined in Section III.A.1 which this memo incorporates for reference, Walmart's motion for summary judgment as to Plaintiff's claim for punitive damages should be denied.

Next, this memo will address the merits of Walmart's motion for summary judgment as to Plaintiff's share of fault in the accident.

D. Comparative Negligence

Tennessee uses a modified comparative fault system, which bars recovery if a plaintiff is fifty percent or more at fault for their injuries. *See McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992). Trial courts may grant summary judgment motions only if, taking "the strongest legitimate view of the evidence in favor of the non-movant," "reasonable minds could not differ as to the legal conclusions to be drawn from that evidence." *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994). The reasonableness of a party's conduct regarding a risk is considered under comparative fault, including whether a reasonable person would have acted like Plaintiff given a similar risk. *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994).

Walmart argues Plaintiff is at least fifty percent at fault for the accident. (Doc. 82 at 12.) Walmart cites Plaintiff's use of the candle without reading any warnings, her disregard of the candle "'flaming up' like 'a small campfire' with 'black smoke,'" and her state of slumber following the candle's unusual behavior. (*Id.*) Walmart also notes testimony by Plaintiff's Rule 26 expert stating that "most people if they were looking at a candle behaving the way [Plaintiff] described, would've probably immediately tried to extinguish it and dispose of it." (*Id.*) Based on the above admissions by Plaintiff and her Rule 26 expert, Walmart argues Plaintiff "failed to

exercise reasonable care for her own safety," preventing a reasonable jury from finding Plaintiff less than fifty percent at fault for the accident. (*Id.* at 12–13.)

Plaintiff responds that, given the proper handling of the candle and lack of outside factors which could have caused the candle's alleged explosion instead of conduct on Walmart's part, a reasonable jury could find that Plaintiff is less than fifty percent at fault for the accident. (Doc. 93 at 13.) She claims she only closed her eyes "for a few moments" rather than falling asleep, and that watching the candle "would not have prevented the explosion nor the injuries that she suffered" due to the accident's unforeseeability. (*Id.*) Plaintiff also disputes the use of the Rule 26 expert's quote regarding ordinary responses to unusual candle behavior, as the remark was part of a broader argument that unusual product behavior is only reported if it results in injury. (*Id.* at 13–14.)

Although Plaintiff's approach to fire safety was not impeccable, it is unclear how a reasonable jury could only find Plaintiff at least fifty percent at fault for the accident. An unmonitored flame presents a risk of spreading fire unhindered, but Plaintiff does not claim she was burned by fire. In a case involving a fire caused by indoor candles burning while the plaintiffs fell asleep, the Court for the District of South Carolina denied a motion for summary judgment due in part to its view that a jury question regarding the plaintiffs' share of fault for failing to extinguish the candles remained. *Graham v. Bassett Furniture Indus., Inc*., No. 4:05-CV-02895-TLW, 2010 WL 4386941, at *3 (D.S.C. Oct. 29, 2010). At the time, South Carolina used a modified comparative negligence system identical to Tennessee's system. *Id.* at *2–3. Here, Plaintiff has alleged she burned the candle outdoors without any possible alternate causes of the alleged explosion. (Doc. 93 at 13.) As the risk posed by her failure to extinguish the candle before falling asleep is different from the harm allegedly done to her by the candle, a reasonable jury

could find Plaintiff to be less than fifty percent at fault for the accident, making summary judgment for failure to satisfy Tennessee's modified comparative fault system inappropriate at this time. Accordingly, Walmart's motion for summary judgment as to Plaintiff's claims generally should be denied.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Walmart's motion for summary judgment as to Plaintiff's TPLA and punitive damages claims and grant it as to Plaintiff's TCPA claim. (Doc. 81.)

Applicant Details

First Name	**Kyle**
Last Name	**Reeves**
Citizenship Status	**U. S. Citizen**
Email Address	**reeves.kyle@hotmail.com**
Address	**Address** Street **526 N Morton St #307** City **Bloomington** State/Territory **Indiana** Zip **47404**
Contact Phone Number	**7276679246**

Applicant Education

BA/BS From	**University of North Florida**
Date of BA/BS	**December 2015**
JD/LLB From	**Indiana University Maurer School of Law** **http://www.law.indiana.edu**
Date of JD/LLB	**May 4, 2024**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**Indiana Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Sherman Minton Moot Court Competition** **Chicago Bar Association Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Robel, Lauren
lrobel@indiana.edu
855-8886

Fischman, Robert L.
rfischma@indiana.edu
855-4565

Geyh, Charles
cgeyh@indiana.edu
855-3210

This applicant has certified that all data entered in this profile and any application documents are true and correct.

KYLE REEVES

526 N Morton St #307 Bloomington, IN 47404
(727) 667-9246 ♦ kylereev@iu.edu

THE HONORABLE KIMBERLY A. SWANK
201 South Evans St., Rm 209
Greenville, NC 27858

July 30th, 2023

Dear Judge Swank,

I am a rising third-year law student at the Indiana University Maurer School of Law, and I am writing to apply for a clerkship in your chambers for the term beginning August 2024.

Though my legal career is something of a second act for me, it is one to which I am passionately committed. During my time as an undergraduate, I had recently escaped from an abusive household and was still learning how to function independently as a queer young adult on the autism spectrum in a new city in which I knew no one. This led to poor academic performance that I once feared would always hold me back. After a few years working for local environmental non-profits, however, I developed a passion for policy and the law that motivated me to take another chance on myself and pursue a legal education.

I'm happy to say that my gamble has paid off, and I've been able to accomplish things that I would not have thought possible just a few years ago. Thus far in law school, I have gained valuable experience researching and writing on complex legal issues as they pertain to actual litigation in both state and federal court, including during my time with the Conservation Law Center and the U.S. Army Corps of Engineers. Through these experiences, I have learned that I most enjoy working on a wide range of legal issues rather than focusing on a single, narrow field of law. I believe a clerkship in your chambers would be the best way to gain exposure to a diverse array of complex legal questions.

I have included my resume, writing sample, and transcript. Also included are letters of recommendation from Provost Emerita Lauren Robel, Professor Robert Fischman and Professor Charles Geyh. Please do not hesitate to contact me if you have any questions.

Sincerely,
Kyle Reeves

KYLE REEVES

(727) 667-9246 ♦ kylereev@iu.edu

Education

Indiana University Maurer School of Law — Bloomington, IN
J.D. Candidate — Expected May 2024
Activities: — GPA: 3.519

- Indiana Law Journal – Executive Editor (Vol. 99), Associate (Vol. 98)
- 2022 Sherman Minton Moot Court Competition – Quarterfinalist
- 2023 Internal Trial Competition – Semifinalist
- 2023 Chicago Bar Association Moot Court Competition – Team Member (To be held in November)
- American Constitution Society – Program Manager

Honors and Awards:

- Dean's Honors – Spring 2023
- Highest Grade Award – Administrative Law, Conservation Law Clinic
- Oral Advocacy Honors – Sherman Minton Moot Court Competition

University of North Florida — Jacksonville, FL
B.S. in Biology, Concentration in Ecology and Evolution — December 2015

Selected Experience

U.S. Army Corps of Engineers — Louisville, KY
Student Trainee, Office of District Counsel — May 2023 – Present

- Drafts legal memoranda advising regulatory division on enforcement actions under federal statutes
- Assists litigation division in discovery matters for suits in which the Corps is a defendant

Conservation Law Center — Bloomington, IN
Legal Intern — Jan – May 2023

- Assisted clients in litigating conservation issues through citizen suits under relevant federal statutes, such as the Clean Water Act and Administrative Procedure Act

Maurer School of Law — Bloomington, IN
Research Assistant — Nov – Dec 2022

- Worked closely with former IU Provost Lauren Robel on an amicus brief in the Indiana Supreme Court case *Members of the Medical Licensing Board of Indiana, et al. v. Planned Parenthood*

Eleventh Judicial Circuit Court of Florida — Miami, FL
Judicial Intern — May – Aug 2022

- Worked in chambers with Hon. Jose Rodriguez, performing legal research to assist in dispositions of pretrial motions
- Helped edit and cite check treatise on Florida Civil Procedure

Ratzan, Weissman & Boldt — Miami, FL
Summer Associate — May – Aug 2022

- Interacted with clients and drafted motions for civil and criminal proceedings

Skills and Interests

●Acting ●Animal Husbandry ●Reading Political Biographies ●Semi-fluent in Japanese

Academic Record of **Reeves, Kyle**

J.D. in progress

Graduated from **University Of North Florida** on 12/1/2015. Major: Biology, Specialization.

Student ID: 2000934925

Indiana University
Maurer School of Law -- Bloomington

I Semester 2021-2022

Legal Res & Writing	Downey, R.	B542	2.0	B
Legal Profession	Wallace, S.	B614	1.0	S
Contracts	Mattioli, M.	B501	4.0	B+
Torts	Lubin, A.	B531	4.0	B+
Civil Procedure	Geyh, C.	B533	4.0	B+

Sem 45.60/14=3.26 `Cum 45.60/14.0=3.257 Hours passed 15.0

II Semester 2021-2022

Legal Research & Writing	Downey, R.	B543	2.0	B+
The Legal Profession	Wallace, S.	B614	3.0	B+
Constitutional Law I	Williams, D.	B513	4.0	B+
Property	Krishnan, J.	B521	4.0	B
Criminal Law	Scott, R.	B511	3.0	B+

Sem 51.60/16=3.23 `Cum 97.20/30.0=3.240 Hours passed 31.0

I Semester 2022-2023

Indiana Law Journal	Sanders, S.	B674	1.0	S
^Appellate Advocacy	McFadden, L.	B642	1.0	S
Civil Procedure II	Geyh, C.	B534	3.0	A
*S Law & Development	Ochoa, C.	L750	3.0	A
International Law	Lubin, A.	B665	3.0	A-
Federal Jurisdiction	Robel, L.	B733	3.0	B+

Sem 45.00/12=3.75 `Cum 142.20/42.0=3.386 Hours passed 45.0

II Semester 2022-2023

Indiana Law Journal	Sanders, S.	B674	1.0	S
^Conservation Law Clinic	Freitag, C	B558	3.0	A+*
Administrative Law	Hammond, A.	B713	3.0	A*
Evidence	Orenstein, A.	B723	4.0	A-
#Wildlife Law	Fischman, R.	B550	3.0	A+
Crim Pro: Trial	Scott, R.	B602	3.0	A-

Dean's Honors Sem 61.90/16=3.87 `Cum 204.10/58.0=3.519 Hours passed 62.0

Hours Incomplete 0.0

Grade and credit points are assigned as follows: A+ or A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D = 1.0; F = 0. A "C-" grade in our grading scheme reflects a failing grade and no credit. An "F" is reserved for instances of academic misconduct. At graduation, honors designation is as follows: Summa Cum Laude - top 1%; Magna Cum Laude - top 10%; Cum Laude - top 30%. For Dean Honors each semester (top 30% of class for that semester) and overall Honors determination, grades are not rounded to the nearest hundredths as they are on this record. Marked (*) grades are Highest Grade in class. Since this law school converts passing grades ("C" or higher) in courses approved from another college or department into a "P" (pass grade), for which no credit points are assigned, there may be a slight discrepancy between the G.P.A. on this law school record and the G.P.A. on the University transcript. Official transcripts may be obtained for a fee from the Indiana University Registrar at the request of the student .

123073

August 03, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am writing in strong support of Kyle Reeves' application for a clerkship. Mr. Reeves was my student in Federal Jurisdiction, where he did quite well in a class of extremely good students. My enthusiasm for Kyle, however, is primarily the result of working with him on an amicus brief in the Indiana Supreme Court. Simply put, Kyle shone in both his writing and his research, and provided critical insights into the shape of the argument.

Kyle was one of four students who volunteered to participate in the research and writing of this brief, and he was the only second-year student in the group. The brief involved issues of first impression under the Indiana constitution. He quickly oriented himself in the subject and digested the other briefs in the case. He was extraordinarily diligent in unearthing historical source material that was important to the ultimate argument and relating it to the central arguments we were advancing. He recognized the importance of key pieces of evidence immediately and communicated quickly and well on both his findings and, more importantly, their relevance to our case. He was both responsive and self-directed.

In short, Kyle Reeves demonstrated all of the analytical and synthetic ability, writing skill, research depth, and personal diligence that is needed for outstanding performance as a law clerk. His class performance was similarly impressive. I recommend him without reservation.

Yours,
Lauren Robel
Provost Emerita
Val Nolan Professor of Law Emerita
Indiana University Maurer School of Law

Lauren Robel - lrobel@indiana.edu - 855-8886

August 03, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I write to recommend Kyle Reeves for a clerkship in your chambers. I know Mr. Reeves principally as a diligent, engaged student in my spring 2023 Wildlife Law class who earned an A+ in a challenging course against stiff competition. Many of the students in the class entered with academic or professional experience in environmental issues. That can be intimidating for a student like Mr. Reeves, who took the class out of general interest and enrichment. He compensated for lack of background in environmental law with determination and passion. I met with him several times to discuss his progress. I can report that he is sincerely committed to developing his legal craft.

Most relevant to your needs for a clerk is Mr. Reeves's excellent legal skills. I observed him deeply engage with the primary sources, constructively participate in class discussion, and deploy keen analysis. Wildlife Law requires students to work independently and maintain a high level of engagement. Mr. Reeves's performance reflected consistent preparation. He clearly does not wait until due dates to examine complex assignments.

In Wildlife Law, I employ short (300-1200 word), frequent (almost weekly) graded assignments as a means of instruction. I also require students to provide weekly responses to discussion questions that force them to question the holdings of cases. Mr. Reeves's writing skills are superb, and his strong performance reflects a supple analytical mind. He applied casebook primary sources to difficult new fact situations, which demands the kind of skills you are likely to find helpful in your chambers. The assignments do not test research skills, only writing and analysis. The assignments have restrictive maximum word limits, requiring students to cut right to the nub of an issue. Mr. Reeves's writing displayed sharp, critical thinking under time pressure.

Though he earned an A+, Mr. Reeves struggled at first with my stingy word maximums in the writing assignments. His early assignments sought to cover too many peripheral issues to demonstrate all the dead ends he pursued in his analysis. However, he proved open to constructive criticism and quickly began writing much better focused memos that plunged right into the dispositive issues. He adapted to a more concise writing style that eschewed general summaries of doctrine and cases. He quickly learned to write narrowly, explaining how an idea, regulatory regime, or case might apply to a novel situation.

I will note in concluding that Mr. Reeves is personable and inquisitive. We frequently discussed common interests and current events after class. During the semester, he gained respect and admiration from his classmates, toward whom he always showed kindness. Whenever I posed a particularly difficult question to the class that yielded no immediate volunteer responses, Mr. Reeves stepped up to get the discussion ball rolling in his soft-spoken, understated style. He is also ambitious and determined. I think he would be the kind of clerk who contributes not only to the work but also to the collegiality of a chambers.

If you would like to talk at greater length about my experience with Mr. Reeves, please email me at rfischma@iu.edu or call at 812-855-4565.

Sincerely,

Robert Fischman
George P. Smith, II Distinguished Professor of Law
Indiana University Maurer School of Law

August 03, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am writing this letter in enthusiastic support of Kyle Reeves' application for a clerkship with your office following his graduation from law school in the spring of 2024.

Kyle is a rare talent who, like many of our best and brightest, has exhibited a pronounced upward trajectory over the course of his law school career. I got to know Kyle nearly two years ago, as a first-year student in my civil procedure class (which covers the rules of litigation procedure). He impressed me as very bright, articulate, and capable, but underperformed on the exam, receiving a grade that, while respectable, did not reflect his abilities and placed him in the middle of the pack. By the next fall, in my civil procedure 2 course (which covers jurisdiction and related concepts) Kyle had hit his stride. He was, hands down, the strongest performer in my class throughout the term, and received a well-deserved A for the class.

I recommend Kyle to you for five reasons:

First, Kyle is engaged. In Civil Procedure 2, Kyle was always prepared for class. He participated actively and well in class discussions. When the going got tough, Kyle was one of my go-to students—the scant handful I could count on to "get it" when others could not.

Second, Kyle is smart. His responses in cold-calls were on point. Our conversations during office hours manifested an agile, and inquisitive mind. He is quick to grasp complex concepts and ask probing questions that manifest an exceptional command of the subject. His analytical skills are second to none.

Third, Kyle thinks deeply. Our wide-ranging conversations in my office often focused on cutting edge developments in jurisdiction. Our discussions of the Supreme Court's impending decision in Mallory v. Norfolk Southern Railway, felt less like Q&A between teacher and student, than a back and forth between colleagues.

Fourth, Kyle is a superb communicator. He is well-spoken. He is concise. He conveys complex ideas with clarity.

Fifth, Kyle is unflappable. He manifests grace under pressure and shows no outward signs of stress when speaking in class—even when his views are probed and challenged.

To end where I began, Kyle will be an excellent clerk. I recommend him to you enthusiastically and without reservation.

Sincerely,

Charles G. Geyh
Distinguished Professor and John F. Kimberling Professor of Law
Indiana University Maurer School of Law

Charles Geyh - cgeyh@indiana.edu - 855-3210

KYLE REEVES

(727) 667-9246 ♦ kylereev@iu.edu

The attached writing sample is a memorandum written during my internship with Indiana University's Conservation Law Clinic. Written in the context of a citizen suit under the Clean Water Act, the memorandum analyzes the testimony of one of our expert witnesses for vulnerabilities and anticipates potential attacks by defense counsel. The memo represents my own work product and has not been substantially edited by another person. All names and other identifying information contained within have been changed to protect confidentiality.

Introduction

This memo is in response to the request to research potential attacks against Stephanie Brown's October 22, 2022, report, which was written as a rebuttal response to the opinions of Todd Carter. Brown, a registered wetland scientist with 27 years of experience conducting stream and wetlands delineations, was retained in this case to support claims that Native Farms filled jurisdictional wetlands and ditches without a permit, in violation of the Clean Water Act. After Brown produced her initial report in May of 2022, Native Farms retained their own experts to support their assertion that the site in question contained no wetlands and that the filled ditches were non-jurisdictional. One of those experts was Todd Carter, a hydrogeologist with A. M. Environmental, who issued four opinions countering certain conclusions in Brown's initial report. These opinions asserted, among other things, that the filled ditches were stagnant and that tiling and filling them did not have a detrimental effect on flow rate or water quality downstream of the site. Brown in turn produced another report rebutting Carter's opinions, and this memo details potential issues Native Farms may raise in a Daubert motion challenging this latest report.

The standard established by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharms.*, Inc., 509 U.S. 579 (1993) allows expert witness testimony to be excluded if the trial judge finds that the expert lacks requisite qualifications, or that the proffered testimony is unreliable or irrelevant. Based on questioning by defense counsel during Brown's second deposition on December 2, 2022, it is possible that Native Farms may file a Daubert motion challenging Brown's qualifications to testify about soil characteristics, as well as the reliability of several of her conclusions regarding the impacts of Native Farm's modifications to the site. Some of these challenges—especially those that relate to Brown's conclusions about the presence of wetlands and the proper methods for determining such—will be easy to counter because of the nature of wetland delineations and her experience in

performing them. Potential challenges that go to the lack of personal observation or measurements by Brown, however, may be more difficult to counter, but are also not as central to proving Native Farms violated the Clean Water Act.

I. Statement of Facts

In February of 2016, Native Farm Holdings, LLC ("Native Farms"), purchased a tract of land in Highland, Hampton County, Arcadia, for the construction of a concentrated animal feeding operation (CAFO). (Pl. Mem. Supp. Summ. J. at 3.) This land, which previously made up a portion of the lakebed of Moccasin Lake and is currently part of the Arcadia River basin, had been drained for agricultural use by the early 1900s. (Ct. Op. Granting Summ. J. of APA Claim at 1-2.) As part of this process, several ditches and drainage canals were constructed to feed into Arcadia River, including Big Island Ditch (BID) and Fern Ditch, parts of which extend into the site of the CAFO. (*Id.*) By the time the site was purchased by Native Farms, portions of the land had been outfitted with a subsurface drainage system, and several lateral ditches had been constructed to drain into the main ditches, to make the land more suitable for row crop production. (Brown CWA Op. at 1.)

In December 2016, Native Farms began the process of converting the site for CAFO use by greatly expanding the existing drainage system, filling in 20,000 feet of lateral ditches, as well as filling in 2,350 feet of BID. (*Id.*) Native Farms began this process without first obtaining a permit per section 404 of the Clean Water Act (*id.* at 1-2), which typically requires a permit to fill any Waters of the United States (WOTUS). (Ct. Op. at 16.) It was not until July of 2018 that Native Farms contacted the United States Army Corps of Engineers (USACE) to perform an approved jurisdictional determination (AJD). (*Id.* at 2.) After an inspection, the USACE issued an AJD confirming that both BID and Fern Ditch were jurisdictional WOTUS, but also concluding that the

site contained no wetlands and that the lateral ditches Native Farms had filled were not jurisdictional WOTUS. (ECF 28.)

In July 2019, Plaintiffs in this action—which include the Arcadia Environmental Alliance (AEA), the Arcadia Audubon Society (AAC), and certain local residents—brought suit in the US District Court for the Northern District of Arcadia against both Native Farms and the USACE. Plaintiffs made two claims. Against the USACE, they claimed that two of the conclusions in the AJD —that the lateral ditches were non-jurisdictional and that the site contained no wetlands—were arbitrary and capricious under section 706(2)(A) of the Administrative Procedure Act (APA). Against Native Farms, Plaintiffs claimed that Native Farms filled 2,350 linear feet of BID, 20,000 linear feet of lateral ditches, and over 500 acres of jurisdictional wetlands without proper permits in violation of section 404 of the CWA. (Compl.) In September of 2021, the court granted Plaintiff's motion for summary judgment on the APA claim, agreeing that the USACE acted arbitrarily and capriciously in concluding that the site contained no wetlands and that the lateral ditches Native Farms filled were non-jurisdictional. Accordingly, the Court remanded the matter to the USACE to reassess its jurisdiction over Native Farms' land consistent with the court's opinion. (Ct. Op. at 37.)

Initial Report of Plaintiffs' Expert Rachele Baker

As to Plaintiffs' CWA claims against Native Farms, both parties retained expert witnesses to produce opinions in support of their respective positions. Plaintiffs retained Stephanie Brown, an environmental consultant with more than 27 years of experience conducting wetland determinations and WOTUS assessments for purposes of Section 404 of the CWA. (Brown Curriculum Vitae.) In her initial report dated May 15, 2022, Brown detailed her review of the available evidence and data to determine whether wetlands existed at the site before Native Farms altered the site's hydrology by filling ditches and expanding the drainage system. (Brown Op. at 2.) She noted that, because these

alterations had already occurred by the time the USACE performed its inspection, any assessment of whether wetlands existed must follow the procedures for "atypical situations" as set forth in the USACE wetland delineation manual and regional supplement. (*Id.* at 3-4.) Those procedures direct delineators to rely on historical data such as aerial photography, county soil survey data, and other sources. (*Id.*)

Reviewing these sources, including soil boring data from soil testing conducted shortly before Native Farms' modifications, Brown concluded that she would have expected to find at least 700 acres of wetlands on site. (*Id.* at 3, 6-8.) In particular, she noted the Hampton County Soil Survey data indicated that hydric soils comprised over 85% of the site, that aerial photography from Google Maps showed wet conditions both on-site and on adjacent properties (*id.* at 3), and that several boring logs showed the presence of mottles within 12 inches of the surface—an indicator of the seasonal high water table. (*Id.* at 7.)

Regarding the lateral ditches that had been filled, Brown noted that though the USACE's AJD did not include any observations about either their nature or flow conditions, after-the-fact evaluations are both possible and common using readily available data. (*Id.* at 3-4) Brown explained that topographic ditch survey measurements taken in August of 2016 confirmed that the lateral ditches were excavated below the water table, and thus would have intercepted groundwater. (*Id.* at 4.) She also concluded that, based on the USACE's guidance letters regarding irrigation versus drainage ditches—and contrary to Native Farms' assertions—all on-site ditches would be considered *drainage* ditches because they drained groundwater, and also because topographic data showed slopes that carried water away from the site. (*Id.* at 5.) She used this readily available data to conclude that the lateral ditches experienced relatively permanent flow and were indirectly connected to the Arcadia River via direct connections to Fern Ditch and BID. (*Id.* at 4.)

In addition to her conclusions about the presence of wetlands and the jurisdictional nature of the ditches, Brown's testimony also included opinions about the effect of Native Farms' modifications to the surrounding land, in particular the adjacent Arcadia Sands. She noted that Native Farms had not only expanded the subsurface drainage system, but added high-capacity pumps. (*Id.* at 8.) Assuming the pumps were intended to pump down the water table more efficiently, she concluded that the resulting loss of wetlands would result in increased flooding, lower groundwater levels, increased surface-water pollution, and detrimental effects on downstream recreation opportunities such as boating, fishing, bird watching, and hiking. (*Id.*) She also noted the increased impervious surface area of the site, concluding that this would result in increased runoff and, in combination with the extensive tile system and pumps, reduced groundwater recharge and more "flashy" stream flows following storm events. (*Id.* at 9.) Finally, citing published studies on the impacts of tile drains in wetland watersheds, she concluded that the drier environment resulting from these alterations would in turn result in loss of the unique plant and animals species that depend on the Arcadia Sands. (*Id.* at 10-11.)

Carter's Report

One of Native Farms' retained witnesses, Todd Carter, a hydrogeologist with A. M. Environmental whose primary expertise is in chemical pollutants in groundwater, issued his response to Brown's initial opinion on June 13, 2022. (Carter Op.) Carter's report contained four opinions and was primarily based on a review of documents provided to him by Native Farms and obtained from the Arcadia Department of Natural Resources (ADNR)'s Virtual File Cabinet (VFC), a site visit conducted on May 17, 2022, and conversations with William Young, the site's operating manager. (*Id.* at 6.) As preface to his opinions, Carter emphasized the fact that the site had been drained for agricultural use over a hundred years before Native Farms purchased it and that the

Hampton County Survey Office had informed Native Farms that the ditches on-site were private, unregulated ditches. (*Id.* at 4.)

In his first opinion, Carter noted that he could observe no flowing water in any of the remaining unfilled ditches on the site, with the exception of Fern Ditch. (*Id.* at 6.) Carter also made the novel assertion that the portion of BID that had been filled was actually a separate ditch (which he termed "Ditch A") that flowed in the opposite direction of the remainder of BID. He based this assertion on ditch survey data from August of 2016, as well as United States Geological Survey (USGS) topographic data, that showed a difference in water depth varying from .1 to 1.6 feet between the east and west ends of "Ditch A." (*Id.* at 9.) Therefore, he concluded, the segment that was filled was not a WOTUS, nor did it flow into one—except during storm events that could overcome this difference in elevation. (*Id.*)

In his second opinion, Carter asserted that the "hydraulic balance" of the site had not been altered by the expanded subsurface drainage surfaces because the amount of water entering the system and leaving through the tiles and pumps was roughly equal to what it had been through the open ditches. (*Id.* at 9-10.) In his third opinion, he went further and asserted that this expanded drainage system could actually have a positive impact on water quality compared to allowing agricultural runoff to drain directly into the ditches. (*Id.* at 10.) Based on his conversations with William Young, Carter also stated that the pumps added by Native Farms were not meant to lower the groundwater level but rather to pump out the storage tanks that received groundwater from the tiles, and further that these storage tanks were only pumped out approximately seven times per year. (*Id.* at 11.) In his fourth opinion, he used this information to conclude that the alterations to the drainage system would not result in more "flashy" stream flows after storm events. (*Id.* at 12-13.)

Carter dedicated the remainder of his report to rebutting specific portions of Brown's initial report. In particular, he emphasized that any loss of wetland hydrology had been caused by the prior draining of Moccasin Lake in the 1800's. (*Id.* at 18.) Regarding the soil boring logs from 2016, he emphasized that the actual observed ground water level in many of the borings was several feet below the surface and went on to assert that the mottling observed near the surface was likely a leftover indication of the high water level from before the land had been converted to row crop use. (*Id.* at 14-15.) He reinforced this by referencing a Natural Resources Conservation Service (NRCS) report from 1997 that identified the site as prior converted cropland. (*Id.* at 16.)

Brown's Rebuttal

On October 12, 2022, Brown issued a rebuttal opinion to Carter's report. (Brown Rebuttal to Carter.) She first noted that the sources Carter relied on—ADNR's VFC, documents provided by Native Farms, and a conversation with Mr. Young—were not sources she would use in performing a delineation. (*Id.* at 2.) She also noted that the fact that Hampton County did not regulate the ditches present on the site had no bearing on whether they were regulated under the CWA. (*Id.* at 1.) In rebutting Carter's first opinion, she stated that his visit to the site took place four years after the alterations at issue had been made, and thus was not useful in determining the conditions prior to that date. (*Id.* at 2.) She then rejected his characterization of the filled portion of BID as a separate ditch flowing in another direction. (*Id.*) She noted that the survey data that indicated a slight difference in water level was taken in August of 2016, when water levels would have been at their lowest, and that any measured difference could have been due to rounding error and general difficulty in measuring the elevation of ditch bottoms and water levels. (*Id.*) Regarding the USGS topographical data, she stated that it was too imprecise to calculate a 1.6 foot difference in height,

and that even if it were not, it is common for streams and ditches to have higher bed elevations downstream of lower bed elevations. (*Id.*)

Rebutting Carter's second opinion, Brown stated that it was irrelevant whether the "hydraulic balance" of the CAFO site remained the same after Native Farm's alterations, because the site's *hydrology* had been permanently changed by lowering the water table. (*Id.* at 3.) Rebutting his third opinion, Brown conceded that she was unaware that the pumps were only used seven times a year to empty storage tanks rather than to directly pump down the water table, but concluded that this did not change her opinion because it still resulted in a lowered water table. (*Id.* at 3-4.) She then asserted that, because the new, steeper collecting pipes draw down the water more efficiently, there was less time for soil filtration to remove pollutants. (*Id.*) She used the same information, however, to agree with Carter's fourth opinion that the new drainage system would not cause BID to become more "flashy." Rather, she stated that it will result in a ditch that is dry for most of the year, which would have a detrimental effect on downstream fishing and boating. (*Id.* at 5.)

Responding to Carter's individual rebuttals of her initial opinion, Brown noted that, while it is true that mottling can persist for years after a soil is drained, the mottles observed in the soil boring logs from 2017 had formed after the last time the topsoil had been tilled, and that therefore the soil had recently been saturated at the time the borings were taken. (*Id.* at 7.) She also explained that the existence of continuous crop production does not preclude the simultaneous existence of wetland conditions (i*d.*), and that the seasonal high water table, not the observed water level, is what is used as a wetland hydrology criterion. (*Id.* at 12.) She further noted that NRCS classifications play no role in a delineation under the USACE Wetland Delineation Manual. (*Id.* at 8.)

After her rebuttals to Native Farms' expert witnesses were submitted, counsel for Native Farms requested Brown sit for a second deposition, which was conducted on December 2, 2022.

This memo outlines potential attacks that Native Farms may bring against Brown's rebuttal to Carter's report based on questioning she received at this second deposition.

II. Legal Standard

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert witness testimony. Specifically, Rule 702 provides that an expert witness may testify if their specialized knowledge will help the trier of fact understand the evidence or determine a question of fact, their testimony is based on sufficient facts or data, the principles and methods underlying their testimony are reliable, and they have reliably applied those principles and methods to the facts of the case. Fed. R. Evid. 702.

Daubert v. Merrell Dow Pharmaceuticals and its progeny made clear that the trial judge is to be the gatekeeper in determining whether proffered expert testimony meets the standard of 702 by applying a three-part analysis. *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007). Under this analysis, the court is to determine (1) whether the witness is qualified, (2) whether the expert's methods are scientifically reliable, and (3) whether the testimony is relevant so as to "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* (citing *Daubert*, 509 U.S. at 592). It is the proponent of an expert's testimony that must establish by a preponderance of the evidence that the offered testimony satisfies these factors. *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 673 (7th Cir. 2015).

In determining whether an expert is qualified, courts consider the full range of the expert's practical experience as well as academic or technical training. *Stachon v. Woodward*, 2015 WL 10433615 at *2 (quoting U.S. v. Parra, 402 F.3d 752, 758 (7th Cir. 2005)). In determining whether an expert's opinion is reliable, courts consider the extent it is reasoned, uses the methods of the relevant discipline, and is founded on sufficient facts or data. *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d

919, 924 (7th Cir. 2000). Finally, in determining whether an expert's opinion is relevant, courts consider whether the proffered testimony is a good "fit" to the issue to which the expert is testifying, *United States v. Hall*, 165 F.3d 1095, 1102 (7th Cir. 1999), or in other words, whether the testimony is sufficiently tied to the case to aid the factfinder in resolving disputed facts. *Daubert*, 509 U.S. at 591.

III. Argument

Based on questioning of Stephanie Brown during her second deposition by Native Farms' counsel, Native Farms is likely to challenge Brown's rebuttal opinions to Carter's report on grounds of qualification and reliability. First, Native Farms may argue that Brown lacks the requisite qualifications to render opinions on issues relating to soil properties because she is not a registered soil scientist. Second, Native Farms may challenge the reliability of Brown's conclusion that the measured height differences within the filled portion of BID are due to measuring error because the conclusion is based solely on her experience. Third, Native Farms may challenge the reliability of Brown's conclusion that the modifications to the site have altered BID's baseflow because she has never directly measured or observed the ditch's flow since the modifications were made. Fourth, Native Farms may challenge the reliability of Brown's conclusion that the modifications to the site have had a detrimental impact on downstream fishing and boating activities because she has only spoken to a single resident regarding kayaking, and none regarding fishing. Finally, Native Farms may challenge the reliability of Brown's conclusion that the new drainage system does not allow sufficient time for pollutant filtration because she does not rely on any data, but only knowledge of "universal concepts."

A. **Native Farms may challenge Brown's conclusions regarding soil filtration and characteristics on grounds that she is not qualified as a soil scientist.**

During Brown's second deposition, counsel for Native Farms questioned her repeatedly about the conclusions she formed reviewing soil boring logs from the CAFO site, as well as about a statement in her rebuttal to Carter regarding soil retention time and pollutant removal. 2d Brown Dep. at 10; 47-48; 53-74. At one point, counsel for Native Farms specifically asked her if she was a registered soil scientist. 2d Brown Dep. at 48. From this line of questioning, it can be inferred that Native Farms may challenge her qualifications to render opinions on soil characteristics.

The Seventh Circuit has held that experts must have sufficient knowledge and experience in the specific field in which they are testifying, not simply a general or related field. See *Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010) ("The question we must ask is not whether an expert witness is qualified in general, but whether his qualifications provide a foundation for him to answer a specific question." (Internal quotation marks omitted)). The court has also held that "[a] scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty," because doing so "would not be responsible science." *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002). In *Dura*, the plaintiff offered the testimony of Nicholas Valkenburg, a hydrogeologist who had reviewed groundwater models to conclude that the defendant corporation's pumping activities had polluted the groundwater within a well field's "capture zone." *Id.* at 611-12. The court held that while Valkenburg "could have testified that the well field was contaminated . . . and that if [defendant's] plastics plant was within the well field's capture zone some of the contamination may have come from that plant," he was not qualified to comment on the accuracy of groundwater models produced by others, because he lacked the specific expertise in mathematics that was used in constructing them. *Id.* at 613, 615.

Native Farms may challenge any of Brown's conclusions that rely upon soil data on the grounds that her background as a wetlands scientist does not qualify her to testify specifically about soil properties. However, due to Brown's years of experience using soil borings to determine water table levels, it is unlikely defendants will be able to successfully exclude any part of her opinions that uses soil data to determine the existence of wetlands. Unlike the expert in *Dura*, she is not merely serving as the mouthpiece for a scientist in a separate field that she lacks specific expertise in; rather, she routinely collects soil borings in her own work. Even so, they may be more successful challenging her comments on soil filtration and pollutant removal by arguing that expertise in the use of soil data to measure water tables does not "provide a foundation" to comment on the specific question of pollutant filtration.

B. **Native Farms may challenge several of Brown's conclusions on the grounds that they are unreliable.**

The Seventh Circuit has held that "even a supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method," *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000), and that a court must "rule out subjective belief or unsupported speculation." *Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir. 1996). Phrased differently, trial courts must "determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). Therefore, despite Brown's well-established qualifications in the field of wetland delineation, Native Farms may still challenge specific conclusions on the grounds that they are unsupported by reliable methodology. In particular, they may challenge the reliability of her conclusion that the recorded height differences in the filled portion of BID were the result of measuring error, her conclusion that the site modifications have reduced BID's baseflow, her conclusion that the new drainage system has reduced the soil's ability to filter out

pollutants from agricultural runoff, and her conclusion that filling BID has had a detrimental effect on downstream fishing and boating opportunities.

i. Native Farms may challenge as unreliable and speculative Brown's conclusion that the recorded differences in water elevation in the filled portions of BID are due to inaccuracy or human error because the conclusion is not based on any data, but only her experience.

In Brown's rebuttal opinion to Carter's report, she challenged his conclusion that recorded differences in water elevation between the eastern and western ends of the filled portion of BID indicated that water flowed in the opposite direction from the rest of the ditch. Brown Rebuttal to Carter at 2. In rebutting this conclusion, she argued that the survey data cited by Carter was likely inaccurate, stating "[f]rom my own experience conducting longitudinal stream surveys, precision when collecting the elevation of a non-solid surface is not an easy thing." Brown Rebuttal to Carter at 2. Because Carter's assertion that the filled portion of BID is actually a separate ditch is central to their claim that they did not require a permit to fill it, Native Farms may challenge Brown's conclusion as unreliable because she cited only her "own experience."

In *Clark v. Takata Corp*., the court affirmed the exclusion of a report by Dr. James Lafferty, an expert in the fields of mechanical engineering and biomechanics, which concluded that the faulty design of a seatbelt caused the plaintiff's head to strike the interior of his car during a collision. 192 F.3d 750 (7th Cir. 1999). Not doubting Dr. Lafferty's qualifications to testify on the subject, the court nonetheless excluded his testimony as unreliable because he "conducted absolutely no scientific tests to determine the forces acting on the lap belt at the time immediately before and during the impact and rollover, including [plaintiff's] height, weight, and the force of the impact as related to the speed of the striking vehicle." *Id.* at 758. The court also quoted the following segment of his deposition:

> Q: What is your basis for saying that a properly functioning belt would keep him from reaching the roof rail?
>
> A: The lap belt would hold him down.
>
> Q: And what testing or data base do you rely upon in offering that opinion?
>
> A: My experience.
>
> Q: Is that it?
>
> A: That's it.

Id.

Just like the opinion of the expert in *Clark*, Brown's conclusion regarding the measured height differences in the filled portion of BID may be challenged as unreliable and unsupported speculation based only on her "experience." Although measuring the water levels in the ditch was impossible after it had been filled, the court may not look favorably on Brown citing only her experience on this point while Carter has cited professional surveys and USGS measurements.

ii. Native Farms may challenge the reliability of Brown's conclusion that the modifications to the site have reduced BID's baseflow because she has never measured its flow since the pumps were added.

In Brown's rebuttal to Carter's report, she concluded that the modifications to the drainage system would result in BID having reduced baseflow and remaining dry most of the year. Brown Rebuttal at 5. At her second deposition, counsel for Native Farms asked her if she had ever actually visited the CAFO site. She confirmed that though she had briefly viewed the site from the side of the county road out of curiosity, she had not visited the site in forming her opinions. 2d Brown Dep. at 38-39. Brown also stated that she conducted no measurements to support this conclusion. *Id.* at 120. Further, her assertion that BID previously had a steady baseflow was based partially on aerial photography, which was taken intermittently and sometimes several years apart. *Id.* at 120-21. Based on this line of questioning, Native Farms may challenge the reliability of her conclusion

regarding potential reduced baseflow in BID because she never visited the site to conduct her own measurements.

In *Kirk v. Clark Equip. Co.*, 991 F.3d 865 (7th Cir. 2021), the court excluded the testimony of Daniel Pacheco, a licensed engineer with years of experience providing forensic analysis of mechanical engineering issues. The dispute in question involved an accident at a steel factory, in which the plaintiff's leg was injured while operating a mechanical loader. In his report, Pacheco opined that "the unreasonably dangerous condition" of a loader "directly contributed to cause the leg injury suffered by [plaintiff.]" *Id.* at 871. The court rejected this testimony because Pacheco "did not view, inspect, or operate the Loader in person. . . . [h]e never visited [defendant's] factory or inspected the accident site beyond photographs." *Id.* at 876.

Just like the opinions of the expert in *Kirk*, Brown's conclusion may be vulnerable to attack because she never visited the CAFO site, and no measurements or tests were performed. To a certain extent, these challenges can be defeated based on the fact that desktop reviews of publicly available information are part of the standard methodology of wetland delineations, and review of historical aerial photography in particular is recommended practice in the Corp's delineation manual. USACE Record at 188-97. However, while these facts establish the reliability of Brown's methods in determining the existence of wetlands, it will be more challenging to defend a conclusion that modifications have reduced BID's baseflow in the absence of any measurements or data.

iii. Native Farms may challenge the reliability of Brown's conclusion that the modifications to the site are detrimental to downstream fishing and boating opportunities because the conclusion was based on a conversation with a single resident.

As covered in section B.ii, Brown used the new information on Native Farms' modified drainage system (as provided in Carter's report) to conclude that the modifications would result in BID having reduced baseflow and remaining dry most of the year. She then followed up this initial

conclusion by asserting that this would have "a detrimental impact on downstream boating and fishing opportunities." Brown Rebuttal at 5. During her second deposition, counsel for Native Farms pressed her on what opportunities she was referring to, and she replied that she had spoken with local residents who had kayaked in BID. Brown 2nd Dep. at 123-25. When asked if she had spoken to anyone who was no longer able to kayak or fish downstream of the CAFO site, she admitted that she had only spoken with a single local who was unable to kayak, and none who were unable to fish. *Id.* Based on this line of questioning, Native Farms may challenge the reliability of Brown's conclusion regarding impacts on downstream fishing and boating opportunities because they were based on an interview with a single resident.

Though the Seventh Circuit has not spoken on the particular issue of expert witnesses relying on interviews with private residents in suits under the CWA or similar statutes, there is persuasive authority from other jurisdictions. In *Jones Creek Inv'rs, LLC v. Columbia Cnty.*, the trial court considered testimony by Dr. Donna Wear, a biologist retained by plaintiffs to testify on the impacts of unlawful sedimentary discharge on the ecology of the Jones Creek and Savannah River watershed. 2013 U.S. Dist. LEXIS 201501 at *38 (S.D. Ga. 2013). The court admitted her testimony regarding the general adverse effects of increased sedimentation (such as food-chain disruption and reduced breeding habitats for fish), holding that such testimony was admissible because Wear had collected her own turbidity measurements of the site, and because her background in ecology made such general propositions "within her area of expertise." *Id.* at *44.

The court excluded, however, her testimony that increased sedimentation had resulted in reduced populations of a particular species of wading bird within the watershed, which the court noted was "based principally on her interview of one unidentified female who has lived in [the watershed area] for an unknown number of years." *Id.* at *45. Chiding the expert for "t[aking] these

casual observations by a stranger as gospel," *id.* at *46, the court held that "[w]hile experts may rely on information provided by fact witnesses, this is only true if the information is of the type reasonably relied upon by experts in the particular field," and that "it is not reasonable to rely on the homeowner's statements without independent analysis and investigation." *Id.* at *47.

In this case, while Brown may be qualified to testify about the general impacts of altering the hydrology of the Arcadia River watershed, any claims about *specific* impacts, such as reduced boating activities, may be vulnerable to attack if based solely on interviews with residents. If Native Farms raises this challenge in a Daubert motion, it may be necessary to show that conducting such interviews is standard procedure for wetlands scientists when assessing downstream impacts, something the record does not speak on. On the other hand, the exclusion in *Jones Creek* was based partially on the hearsay concerns inherent in relying on unsworn testimony by an unknown resident. Such concerns will likely be mitigated by having citizen plaintiffs testify about their own observations rather than relying on an expert witness who echoes them.

iv. Native Farms may challenge the reliability of Brown's conclusion that the new drainage system reduces the ability of the soil to filter out pollutants in agricultural runoff because she cited no analysis.

In Brown's rebuttal to Carter's report, she concluded that the modified drainage system, with its steeper pipes, will likely not allow sufficient time for microbial activity and plant uptake to assist with pollution removal. Brown Rebuttal to Carter at 4. She cited no analysis, and at deposition conceded that she had performed no testing of the microbial activity or the agricultural runoff from the site. Rather, she cited knowledge of "universal concepts" that were true for all natural systems. 2d Brown Dep. at 121-23.

The Seventh Circuit has held that an expert must "substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless." *Huey v. United Parcel Serv.*, Inc., 165 F.3d

1084, 1087 (7th Cir. 1999) (internal quotation marks omitted). The plaintiff in *Huey* had alleged that his termination by UPS was retaliatory and the result of his complaints of racial discrimination. To support this, he offered the report of a forensic vocational expert with a Ph. D. in human resource development. *Id.* at 1086. The expert concluded that "from the facts presented, based on my professional experience and training and exposure to current laws and regulations as an employment agent for over thirty years . . . [plaintiff] was the victim of a retaliatory discharge by UPS for racially motivated reasons in violation of Title VII." *Id.* The court excluded this testimony, noting that "[e]xperts in discrimination cases often do statistical analysis to determine whether race (or some other protected characteristic) is an explanatory variable," but that this expert "had done no such thing . . . . He did not attempt to reconstruct the underlying facts . . . . He did not explain what field of knowledge a professional in human resource development masters or how this knowledge was employed to analyze [Plaintiff's] situation." *Id.*

Like the expert in *Huey*, Brown's conclusion here may be challenged on the grounds that it provides only an ultimate conclusion with no analysis. Defendants may assert that she did not perform any of the analysis that would be expected to conclude that the explanatory variable (Native Farms' modifications to the drainage system) was responsible for the alleged harm (higher pollutants in agricultural runoff from the site), nor did she explain how her knowledge of natural systems was employed to analyze the situation. While that may be true, this case may be distinguished in that the allegation that the employer in *Huey* terminated the plaintiff for racially motivated reasons was the central issue underlying the suit. Brown's conjecture on the potential effects of the modifications performed on the CAFO site are tangential to the ultimate issue of whether Native Farms violated the CWA by filling jurisdictional wetlands.

IV. Conclusion

Based on the preceding analysis, Native Farms will likely not be successful challenging either Brown's qualifications to comment on soil data, or the reliability of her use of such data (along with aerial photography) as part of a desktop review to determine the existence of wetlands. They may be more likely to succeed, however, if they challenge any of her conclusions regarding the specific effects of their modifications to the site for which she cites no measurements or quantifiable data. Those conclusions, though, are mostly tangential or irrelevant to the question of whether Native Farms violated the CWA through filing and tiling activities.

Applicant Details

First Name	**Kory**
Middle Initial	**C**
Last Name	**Roth**
Citizenship Status	**U. S. Citizen**
Email Address	**Kory.Roth@case.edu**
Address	**Address** Street **1408 Copper Trace** City **Cleveland Heights** State/Territory **Ohio** Zip **44118** Country **United States**
Contact Phone Number	**3302688013**

Applicant Education

BA/BS From	**Capital University**
Date of BA/BS	**December 2020**
JD/LLB From	**Case Western Reserve University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=33603&yr=2013**
Date of JD/LLB	**May 17, 2024**
Class Rank	**50%**
Law Review/ Journal	**Yes**
Journal(s)	**Canada-United States Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**American Bar Association Team Participant** **Dunmore Tournament Participant** **Nationals Moot-Court Team Coordinator**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Graham, Margaret
mgraham@prosecutor.cuyahogacounty.us
2163335550

McDonough, Brian
Brian.McDonough@usdoj.gov
216-701-1586

Sullivan, Michael
Michael.A.Sullivan@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

KORY CRAWFORD ROTH
1408 Copper Trace, Cleveland, OH, 44118 | 330.268.8013 | Kory.Roth@Case.edu

August 8, 2023

The Honorable Kimberly Swank, Magistrate Judge
United States District Court for the Eastern District of North Carolina
201 South Evans St.
Greenville, NC 27858

Dear Judge Swank,

After gaining invaluable experience across all levels of prosecution, I am excited about the opportunity to learn about both sides of the *v* and utilize my advanced writing and research skills working for you. I am a third-year student at Case Western Reserve University School of Law, and I am submitting my application for a one-year clerkship with your chambers. With my diverse experiences, I believe I would be an asset to your staff.

In law school, I placed a heavy emphasis on receiving a well-rounded education. I represented my school at two International Sports Law Competitions. At the Cuyahoga County Prosecutor's Office and U.S. Attorney's Office, I helped prosecute over fifty individuals. I comfortably balanced working in a team-based environment while giving every individual prosecutor the support they needed. I am most proud of the winning briefs I wrote for Ohio's Eighth District Court of Appeals and Sixth Circuit Court of Appeals. This summer, I am with the Ohio Attorney General's Office in the Major Litigation unit working on novel legal issues and unprecedented cases. Next year, I am working in both the appellate and environmental law clinic.

I believe I am a good fit for this clerkship because of my ability to adapt. Despite the pandemic, I completed two theses projects and reached my goal of graduating in 3.5 years in undergrad. I also adjusted to the rigorous demands of law school. During my first semester, I struggled, and my grades reflect that. I improved by studying hard and learning everything I could find on legal writing. As a result, my legal writing grade rose from a C+ to an A- from my first to second year. Additionally, I am on pace to graduate with a concentration in Environmental Law with honors.

Furthermore, I would be a good match for this clerkship because I want to see justice and equality for. I am willing to take on a large caseload and put in the long hours that it takes to effectively perform my role as a neutral umpire. As an aside, I worked as an umpire, which taught me a lot about intense conflict resolution.

Thank you for your consideration. I am available to interview at your convenience. If accepted for this position, I am happy to start in August 2024 after the bar. My fiancée and I are excited to start married life in a new city with a lot more sunshine. Thank you, and I look forward to hearing from you.

Respectfully,
Kory C. Roth

KORY CRAWFORD ROTH
1408 Copper Trace, Cleveland, Ohio, 44118
330-268-8013 | Kory.Roth@Case.edu

EDUCATION

Case Western Reserve University School of Law, Cleveland, Ohio
Juris Doctor, GPA: 3.358, Rank 66 of 165, anticipated May 2024
- Fall 2022 & Spring 2023 Dean's Honor List
- Christian Legal Society Co-President
- Tulane School of Law International Baseball Arbitration & Pro Football Negotiation Competitor
- The Legal Aid Society of Cleveland Volunteer

Capital University, Columbus, Ohio
Bachelor of Arts, Environmental Science, Minor in Geological Science, GPA: 3.469, Dec 2020
- Boyd Fund Award Winner for Undergraduate Research
- Major Thesis: Mosquito Population Correlations to Climate Variations in the Summer of 2020
- Minor Thesis: The Role of the Primmer Wetland in Carbon Sequestration
- NCAA Division III Football: Special Teams Player of the Year & S.A.A.C. Representative

EXPERIENCE

Milton & Charlotte Kramer Law Clinic
Legal Internship, Appellate Litigation & Environmental Clinic, Anticipated Aug 2023 – May 2024
- Represent clients in all phases of the appellate process in civil and criminal cases
- Initiate the appeal, ensure a complete transcript, draft the briefs, and conduct oral argument
- Solve a full range of environmental issues including environmental and energy justice issues
- Teach clients, organizations, community members on environmental policy issues effecting Ohio

Ohio Attorney General's Office
Legal Clerkship, Major Litigation Section, May 2023 – August 2023
- Assist attorneys on legal and factual research for complex issues supporting some of Ohio's largest cases
- Draft briefs and memos, review transcripts and discovery materials, and take notes for agency meetings
- Connect with Ohio's many political subdivisions including state legislators and judicial officers

United States Attorney's Office for the Northern District of Ohio
Legal Clerkship, Criminal Division, January 2023 – April 2023
- Wrote motions and briefs for the District Court and the Sixth Circuit
- Assembled exhibits for trial as well as observed motion hearings and trials for those cases
- Worked in a variety of criminal law areas from white-collar and environmental crime to drug trafficking

Canada-United States Law Journal
Associate Editor, September 2022 – Present
- Work with a bi-national editorial team to support the next journal volume and ongoing research projects
- Carefully review and edit articles to ensure citation quality, accuracy, and credibility
- Utilize writing, editing, and critical-thinking skills to produce high-quality journal articles

Coleman P. Burke Environmental Law Center
CWRU School of Law Student Fellowship with Professor Jonathan Adler, May 2022 – Present
- Draft articles and materials for the Burke Center Website and Emails
- Conduct legal, scientific, and economic research, and cite-check to support Prof. Adler's publications

Cuyahoga County Prosecutor's Office
Legal Clerkship, General Felony & Appellate Units, May 2022 – December 2022
- Drafted motions and briefs conducting both legal and factual research on tight deadlines for 20+ attorneys
- Assisted in and observed all levels of post-conviction prosecution
- Observed and assisted in court proceedings including preparing both trial and appellate arguments

Student ID: 3550401
SSN: XXX-XX-4414
Student Name: Kory C Roth

Case Western Reserve University
Unofficial Transcript

Academic Program History

Program: Juris Doctor
Active in Program

Beginning of Law Record

Fall 2021

Course	Description	Attempted	Earned	Grade	Points
LAWS 1101	Contracts	4.00	4.00	B	12.000
LAWS 1102	Criminal Law	3.00	3.00	A-	10.998
LAWS 1103	Torts	4.00	4.00	B-	10.664
LAWS 1801	LLEAP1 - Wrtng Advcy & Proflsm	3.00	3.00	C+	6.999

			Attempted	Earned	Averaged	Points
Term GPA:	2.904	Term Totals	14.00	14.00	14.00	40.661
Cum GPA:	2.904	Cum Totals	14.00	14.00		40.661

Spr 2022

Course	Description	Attempted	Earned	Grade	Points
LAWS 1201	Civil Procedure	4.00	4.00	B	12.000
LAWS 1203	Property	4.00	4.00	B	12.000
LAWS 1204	Legislation and Regulation	3.00	3.00	A	12.000
LAWS 1905	Lgl Analysis & Prob Solving	1.00	1.00	CR	0.000
LAWS 1802	LLEAP2 - Wrtng Advcy & Proflsm	3.00	3.00	B+	9.999

Academic Standing: Good standing

			Attempted	Earned	Averaged	Points
Term GPA:	3.286	Term Totals	15.00	15.00	14.00	45.999
Cum GPA:	3.095	Cum Totals	29.00	29.00		86.660

Class Rank: 94 of 163

Fall 2022

Course	Description	Attempted	Earned	Grade	Points
LAWS 2803	LLEAP 3: Advanced Skills	3.00	3.00	A-	10.998
LAWS 6111	Appellate Practice	2.00	2.00	A	8.000
LAWS 7110	Legal Externship I	4.00	4.00	CR	0.000
LAWS 2002	Constitutional Law	4.00	4.00	A-	14.664
LAWS 5727	Environmental Law	3.00	3.00	A-	10.998

Academic Standing: Good standing

Term Honor: Dean's Honor List

			Attempted	Earned	Averaged	Points
Term GPA:	3.722	Term Totals	16.00	16.00	12.00	44.660
Cum GPA:	3.283	Cum Totals	45.00	45.00		131.320

Spr 2023

Course	Description	Attempted	Earned	Grade	Points
LAWS 2001	Professional Responsibility	3.00	3.00	B+	9.999
LAWS 6501	Canada - U.S. Law Journal	1.00	1.00	CR	0.000
LAWS 6111	Appellate Practice	2.00	2.00	A	8.000
LAWS 7120	Legal Externship II	3.00	3.00	CR	0.000
LAWS 5717	Constitutional Law II	3.00	3.00	B	9.000
LAWS 4807	Criminal Procedure I	3.00	3.00	A	12.000
LAWS 5754	Energy Law	3.00	3.00	A-	10.998

Academic Standing: Good standing

Term Honor: Dean's Honor List

			Attempted	Earned	Averaged	Points
Term GPA:	3.571	Term Totals	18.00	18.00	14.00	49.997
Cum GPA:	3.358	Cum Totals	63.00	63.00		181.317

Class Rank: 66 of 165

Fall 2023

Course	Description	Attempted	Earned	Grade	Points
LAWS 4401	Business Associations	4.00	0.00		0.000
LAWS 6160	Appellate Litigation Clinic	6.00	0.00		0.000
LAWS 4806	Administrative Law	3.00	0.00		0.000

Spr 2024

Course	Description	Attempted	Earned	Grade	Points
LAWS 4808	Evidence	4.00	0.00		0.000
LAWS 6108	Pretrial Practice: Criminal	2.00	0.00		0.000
LAWS 5738	Land Use Control	3.00	0.00		0.000
LAWS 6071	Environmental Law Clinic	6.00	0.00		0.000

Student ID: 3550401
SSN: XXX-XX-4414
Student Name: Kory C Roth

Case Western Reserve University
Unofficial Transcript

Career Totals			Attempted	Earned	Averaged	Points
Cum GPA:	3.358	Cum Totals	91.00	63.00	54.00	181.317
Total Credits Earned:	63.00					

End of Law Record

June 26, 2023

To Whom it May Concern:

I am an Assistant Prosecuting Attorney with the Cuyahoga County Prosecutor's Office. Mr. Roth assisted me with several writing assignments during this internship with our office. Specifically, Mr. Roth drafted a response to a Motion in Opposition to Suppress a blood draw after an OVI accident, which required some in-depth legal research and case application. Mr. Roth put a great deal of effort into researching the case lay and replying to the many arguments that defense counsel made in its motion. It was apparent in the final draft that Mr. Roth spent a great deal of time responding to the motion and he did an extremely thorough job. Further, he checked in with me periodically while working on the project to ensure that all deadlines were met. Mr. Roth was very willing to learn and assist in everything he could. I highly recommend him for this position.

Best,

Margaret E. Graham
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
Justice Center
1200 Ontario – 9th Floor
Cleveland, Ohio 44113
Office: (216) 443-7850
Email: mgraham@prosecutor.cuyahogacounty.us

U.S. Department of Justice

United States Attorney
Northern District of Ohio

United States Court House
801 West Superior Avenue, Suite 400
Cleveland, Ohio 44113-1852

June 21, 2023

Re: Recommendation Letter for Kory C. Roth

Dear Judge:

I am an Assistant United States Attorney in the White Collar Unit of the United States Attorney's Office for the Northern District of Ohio. I have been with the Office since 2014 and serve as the Elder Justice Coordinator, where I work with federal and state law enforcement and community partners to investigate and prosecute elder fraud cases. Before becoming an AUSA, I was an Assistant Cuyahoga County Prosecutor for 13 years. I worked with Kory for the 2023 spring semester.

Kory did an excellent job in drafting a sentencing memorandum for me in the case of a former chief operating officer who failed to report income taxes. Kory's clear and concise writing, and detailed citations were outstanding.

Throughout his clerkship at my office, Kory was professional. He worked on a variety of routine and complex legal issues. He earned respect with his diligence, hard work, and commitment. His skill set and temperament make him well-suited for a judicial clerkship.

If you would like to contact me about Kory, please call me at (216) 701-1586.

Sincerely,

Brian M. McDonough
Assistant United States Attorney
White Collar Crimes Unit
Elder Justice Coordinator
Brian.McDonough@usdoj.gov

August 08, 2023

The Honorable Kimberly Swank
United States Courthouse Annex
215 South Evans Street
Greenville, NC 27858-1121

Dear Judge Swank:

I am happy to recommend Kory Roth for a judicial clerkship. I am a Senior Litigation Counsel with the U.S. Attorney's Office in the Northern District of Ohio. I am also responsible for managing our law student extern program in the Criminal Division in the Spring and Fall semesters. Kory was an extern here in the Spring of 2023.

As as extern, Kory was asked complete a number of legal research and writing assignments. While here, he drafted motion responses, sentencing memoranda, research memos, and 6th Circuit Appellate Briefs. He was also responsible for attending a weekly meeting, during which he described his current project(s) and identified the legal issues as well as the results of his research.

Kory always exhibited enthusiasm and willingness to work. He volunteered to take on multiple projects simultaneously and always completed his projects on time or early. His research skills and writing skills were very good. I recommend, without hesitation, Kory Roth for a judicial clerkship.

If you have any questions, please feel free to email me at Michael.A.Sullivan@usdoj.gov or call me at 216-622-3977.

Thank you.

Michael A. Sullivan

Writing Sample for Kory Roth

First Impression Civil Appeal

- I wrote this for my Appellate Practice course, which helped me move on in the Dunmore Tournament.
- The issues before the court were whether plasma donation centers are service establishments and whether there was a final decision ready for appeal when the plaintiff voluntarily dismissed her claim without prejudice.
- Citations are formatted according to Bluebook.
- The table of authorities, statement of the case, and the conclusion are omitted with other portions also omitted, which are designated by {}.

Kory C. Roth

CWRU School of Law JD Candidate 2024

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I. JURISDICTIONAL STATEMET

II. STATEMENT OF THE ISSUES

Issue 1: {} Are plasma-donation centers service establishments?

Issue 2: The final-judgment rule states that a court of appeals has jurisdiction over final decisions. The lower court passed final judgment when it dismissed Perry's ADA Claim and subsequently dismissed Perry's State Negligence Claim. Perry thus has no remaining claims for the lower court to decide after dismissing her peripheral claim and swiftly filing this appeal. Is there a final decision?

III. STATEMENT OF THE CASE

A. Hawthorn Denies Perry from Donating Her Plasma.

B. The District Court Decided that Plasma-Donation Centers are Not Service Establishments.

IV. SUMMARY OF THE ARGUMENT

The statutory language is clear: Plasma-donation centers are service establishments under the ADA. Hawthorne Centers are business *establishments* that provide *services* to the public and its donors. Hawthorne gains millions in revenue from its donors and from the services the centers provide. The expansive congressional purpose of the ADA reinforces this liberal interpretation, which the Supreme Court

has repeated in *Garret* and in then again in *Martin*. Furthermore, both the regulatory and enforcement arm of the Executive Branch agree with Perry. This Court, like the Third and Tenth Circuits, and the Northern District Court of Illinois, should hold that plasma-donation centers are service establishments.

Additionally, this Court has jurisdiction under the traditional final-judgment rule because the district court has nothing left to decide. This Court alternatively can find jurisdiction under the "practical-prejudice" test because Perry quickly dismissed her peripheral claim. And this Court should reject the dangerous *Ryan* rule. {}.

V. ARGUMENT

A. Plasma-Donation Centers are Service Establishments and Thus are Public Accommodations Under the ADA.

The ADA's plain language and purpose support a liberal interpretation concluding that plasma-donation centers are service establishments under the ADA. Furthermore, the Fifth Circuit in *Silguero* wrongly decided—ignoring Supreme Court precedent to rule based on *ejusdem generis*—the central question in this case. {}. Ultimately, this Court should find that plasma-donation centers are service establishments and reverse the district court.

1. The ADA's Plain Language Firmly Establishes that Plasma-Donation Centers are Service Establishments.

Beginning with the plain language of the ADA, this Court should find that plasma-donation centers are service establishments. *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980) ("[W]e begin…with the language."). Courts interpreting the ADA must construe "other service establishments" liberally to afford individuals with disabilities to access to the same establishments available to those without disabilities. *Levorsen v. Octapharma Plasma, Inc*, 828 F.3d 1227, 1230 (2016) (citations omitted). When a statute does not define its words, like service establishments, those words are "interpreted as taking their ordinary, contemporary, [and] common meaning." *Sandifer v. U.S. Steel Corp*., 571 U.S. 220, 227 (2014). Furthermore, if the statute's plain meaning is unambiguous, the "inquiry ends there," *BedRoc, Ltd. v. United States*, 541 U.S. 176, 183 (2004), and the court enforces "that plain meaning." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citations omitted).

The ADA provides a non-exhaustive list of examples ranging from banks, professional health care offices, and hospitals then accompanied by a broad catch-all: "or other service establishment[s]" to define public

accommodations. 42 U.S.C. § 12181(7)(F). Plasma-donation centers unambiguously fall within "other service establishment[s]." *Id*. As other courts show, the inquiry should stop at the plain meaning.

There other courts found—as this Court should—that under the ADA's plain meaning plasma-donation centers are service establishments. The Tenth Circuit in *Levorsen* broke down the plain meaning of a *service establishments*. Relying on the dictionary definition, the court defined an establishment as a "place of *business*" or a "public or private institution" including schools or hospitals. *Levorsen*, 828 F.3d at 1231 citing Webster's Third New Int'l Dictionary 778 (2002) (emphasis added). The court defined "service" as "conduct or performance that assists or benefits someone or something" or "useful labor that does not produce a tangible commodity." *Id*. Under those common definitions, the Tenth Circuit concluded that plasma-donation centers are service establishments because they are businesses that benefit—or *serve*—people who provide plasma for medicinal uses. *Id*. at 1234. The court rejected the plasma-donation center's argument that a service establishment must be the one receiving payment, and not the customer: "[W]e won't bend over backwards to give… 'service

establishments' a definition that is [narrower] than [its] plain meaning…" *Id*. at 1232. The court ultimately held that "a service establishment is—unsurprisingly—an establishment that provides a service." *Id*. at 1231. *See also CSL Plasma Inc. v. United States Customs & Border Prot.*, Civil Action No. 21-cv-2360 (TSC), 2022 U.S. Dist. LEXIS 168053 at 24-25* (D.D.C. Sep. 16, 2022) (suggesting support for *Levorsen* in *dicta*).

Like the Tenth Circuit, the Third Circuit in *Matheis* concluded that "the ADA applies to plasma donation centers." *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019). *Matheis* took an analogical approach to plain text interpretation by comparing plasma-donation centers to banks—an example from §12181(7)(F). *Id*. at 177. CSL Plasma's position—that even under the *Levorsen*'s definitions, a plasma-donation center is not a service establishment because "unlike every other establishment listed in [§12181(7)(F), CSL] provides no benefit to the donors," but instead the donors are providing the service—was rejected. Brief for Appellee at 1, *Id*. The court reasoned that a bank closely relates to plasma-donation centers because both businesses use "its public-facing services for…profit." *Id*. at 177. The

court reasoned that "any emphasis on the direction of monetary compensation" fails. *Id*. Both industries hold the item—money or plasma—for a certain period and then invest or sell the item for personal gain. *Id*. Additionally, the listed examples underscored "a simple fact: providing services means providing something of economic value to the public…whether it is paid for with money" or an act does not matter. *Id*. at 178.

The court explained further that other examples of businesses where customers are paid, including pawnshops and recycling centers, are also service establishments. *Id*. at 178. The Third Circuit concluded that a plasma donation center is a service establishment under the ADA because it "offers a service to the public, the extracting of plasma for money, with the plasma then used by the center in its business of supplying a vital product to healthcare providers." *Illinois v. CSL Plasma, Inc.*, No. 20-CV-3535, 2022 U.S. Dist. LEXIS 189885, at *11-12 (N.D. Ill. Oct. 18, 2022) (quoting *Matheis*, 936 F.3d at 178).

The Northern District Court of Illinois held similarly to *Levorsen* and *Matheis*. *Illinois*, 2022 U.S. Dist. LEXIS 189885, at *2. The court started with the dictionary definition of establishment as "a place of

business or residence with its furnishings and staff." *Id*. (quoting *Establishment*, Merriam-Webster Online Dictionary (last visited Oct. 11, 2022), https://www.merriam-webster.com/dictionary/establishment). And the court found service to mean "a helpful act or useful labor that does not produce a tangible commodity." *Id*. at 12-13. (internal quotations omitted). Put together, "service establishments" must include plasma-donation centers. *Id*. at 13.

Because the ADA is clear, this Court should follow *Levorsen*, *Matheis*, and *Illinois* and find that Hawthorne is a service establishment and thus a public accommodation under the ADA. Hawthorne is a business—fitting establishments' plain meaning. Hawthorne, like CSL Plasma, serves the public by accepting plasma from its donors, paying the donors, and subsequently selling the plasma to pharmaceutical companies—and thus is a service establishment. R. 5. Hawthorne fits the bank analogy in *Matheis* and is directly related to other 42 U.S.C. § 12181(7)(F) examples including pharmacies. A pharmacy accepts drugs from outside sources—such as donors at plasma-donation centers—and then sells the drugs on the open market—like selling plasma to pharmaceutical companies.

Furthermore, plasma-donation centers do provide a benefit to donors—money. In sum, the ADA's plain meaning commands that plasma-donation centers be service establishments.

2. Congressional Intent, Judicial Interpretations, Executive Actions, and Public Policy Support Perry.

Congress declared through the ADA "that…physical…disabilities [should] in no way diminish a person's right to fully participate in all aspects of society…" 42 U.S.C. §12101(a)(1). Congress invoked the full breadth "of congressional authority" to sniff out disability-based discrimination. *Id*. at (b)(4). {}. The Supreme Court followed suit.

The Court interprets the ADA broadly to effectuate its congressional purpose. The Court found the Act to be a "milestone on the path to a more decent, tolerant, progressive society." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). The Court interprets public accommodations liberally. *Martin*, 532 U.S. at 676. The executive branch also supports the liberal interpretation.

The executive's branch regulatory and enforcement arm support Perry's position. First, the regulation implementing ADA Title III makes clear that the list in § 12181(7)(F) is not exhaustive. 28 C.F.R. Pt. 36, App. C § 36.104. The regulation explains that while the twelve

listed categories of public accommodations "is exhaustive, the…examples of facilities within each category are not." *Id*.

Second, the Justice Department supports Perry. The department filed an interest statement in *Illinois* that advocated for the "position that [plasma-collection] centers [are] 'places of public accommodation.'"[1] *Illinois*, 2022 U.S. Dist. LEXIS 189885 (N.D. Ill. Oct. 18, 2022) at *7. The Department focused on Title III's plain meaning: that plasma-donation centers are "service establishments" because they are establishments that provide a service. Statement of Interest of the United States of America at 4-5, *Illinois.*, 2022 U.S. Dist. LEXIS 189885 (N.D. Ill. Oct. 18, 2022). They also agreed with *Levorsen* and *Matheis* that the ADA should be interpreted broadly to affect its purpose. *Id*. at 6, 9-10. All-in-all, the three branches of the federal government all support Perry's position: plasma-donation centers are service establishments.

[1] The DOJ also filed amicus briefs in *Levorsen* and *Silguero*) supporting the same premise. Brief for U.S. as Amicus Curiae Supporting Neither Party, *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018); Brief for U.S. as Amicus Curiae Supporting Appellant and Urging Reversal, *Levorsen.*, 828 F.2d 1227 (10th Cir. 2016).

Public policy further supports Perry. {}. In short, this Court should align with the federal government at-large and expand the donor pool by finding that plasma-donation centers are service establishments.

3. *Silguero* Applied *Ejusdem Generis* Inconstantly With Supreme Court Precedent, And Thus Was Wrongly Decided.

The Fifth Circuit in *Silguero* used *ejusdem generis* to guide its decision—disregarding how the Supreme Court applies the cannon. *Silguero v. CSL Plasma Inc.*, 907 F.3d 323, 329 (2018). The Court repeatedly holds that *ejusdem generis* is only for "when there is uncertainty." *Garcia v. United States*, 469 U.S. 70, 74 (1984) (citations omitted). The Court has done so for more than a century. *See, e.g.*, *Russel Motor Car v. United States*, 261 U.S. 514, 520 (1923); *Yates v. United States*, 574 U.S. 528, 564 (2015) (5-4 decision) (Kagan, J. dissenting) ("[T]his Court uses…*ejusdem generis* to resolve ambiguity, not create it.").

As demonstrated above, "service establishment" is not ambiguous and plainly encompasses plasma-donation centers. *Ejusdem generis* is therefore misplaced. *See Levorsen*, 828 F.3d at 1232 ("[W]e decline to apply ejusdem generis" because the language is clear.).

Even if *ejusdem generis* applied, *Silguero* is still wrong. The court also held that plasma-donation centers do not provide a service because the centers do not receive payment from the public as may be typical for service establishments. *Silguero*, 907 F.3d at 330. But that holding ignores the fact that service establishments—like banks and recycling centers—do not receive compensation from customers. Plasma-donation centers—like Hawthorne—sell plasma on the open market to pharmaceutical companies. Additionally, *ejusdem generis* does not limit a broad catchall phrase. *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1786 (2022) (8-0 decision). In *Southwest*, the Supreme Court re-affirmed that "[w]ell-settled cannons of statutory interpretation **neither demand** nor **permit** limiting a broadly worded catchall phrase…" *Id*. (emphasis added). {}

To conclude, a plasma-donation center is an *establishment* that provides a *service*—a service establishment. {}. Thus, this Court should reverse the lower court and find that plasma-donation centers are service establishments.

B. This Court has Jurisdiction Because the Case has Finality and is Thus Ready for Appeal.

This Court first has jurisdiction over Perry's case under the traditional final-judgment rule. The Court also would have jurisdiction over the case under the more rigid "practical-prejudice" test. And because this Court should not adopt the unpracticable *Ryan* rule—as would be against Supreme Court precedent and sound public-policy—this Court has jurisdiction over Perry's case.

1. This Court Has Jurisdiction Because Perry Has No Remaining Claims In The District Court.

First, this Court has jurisdiction under the final-judgment rule because Perry has no claims remaining in the district court. Generally, when a district court allows a plaintiff to dismiss her action without prejudice, the decision is final and ready for appeal. *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987); *see also Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1155 (3d Cir. 1986) ({}). Courts similarly find jurisdiction when a plaintiff voluntarily dismisses remaining claims. *Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-67 & n.1 (7th Cir. 1976) ({}); *see also Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991) ({}). In total, the First, Sixth, Eighth, and

D.C. Circuits follow this approach with others joining intermittently. *See* Ankur Shah, *Increase Access to the Appellate Courts: A Critical Look at Modernizing the Final Judgment Rule*, 11 Seton Hall Cir. Rev. 40, 53-54 (2014) (explaining circuit split).

To explain, the Eighth Circuit in *Hope v. Klabal*, 457 F.3d 784 (8th Cir. 2006) found jurisdiction in a case like the present case. There, the lower court granted partial summary judgment to the defendant leaving one claim remaining. *Id*. at 788. The defendant allowed the plaintiff to dismiss the remaining claim without prejudice, and the parties filed a stipulation order with the district court. *Id*. On appeal, the Eighth Circuit *sua sponte* evaluated jurisdiction: "[T]he question is whether… [voluntarily dismissing] the only claims that survived…was sufficient" for a final decision. *Id*. at 789. The court followed *Chrysler* and held "that jurisdiction exists." *Id*.

Perry's case aligns with *Hope*. The lower court tied up all loose ends—allowing this Court to freely decide the substantive issue. Perry moved the court to dismiss her remaining claim, and the court agreed. R. 19-21. The "suit ended…as the District Court [is] concerned." *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) ({})

(citation omitted). Under the traditional final-judgement rule, the case is final and ready for appeal.

2. Because Perry Risks Her State-Law Claim, this Court Can Find Jurisdiction Under a "Practical-Prejudice" Test.

This Court can also accept jurisdiction under the more rigid "practical-prejudice" test. In *De Manez v. Bridgestone Firestone N. Am. Tire, LLC.*, the Seventh Circuit recognized that dismissing a case without prejudice has finality because "a dismissal ends the case…" 533 F. 3d 578, 583-84 (7th Cir. 2008). Mostly followed by Ninth and Federal Circuits with others joining occasionally, Shah, *supra*, at 54, 54 n. 51, this approach allows a party who voluntarily dismissed claims without prejudice when the appellant does not take advantage of appellate review. *Id*. at 55. Appellate courts using the "practical-prejudice" test apply many factors including but not limited to whether:

(1) the non-adjudicated claim is dismissed with court approval
(2) the remaining claim is subject to the statute of limitations
(3) the winning or losing party dismissed the remaining claims
(4) the appellant used any delay tactics
(5) the non-adjudicated claim was re-filed
(6) the claims are dismissed in one swoop
(7) the voluntarily and involuntarily dismissed claims are related

Id. at 72 (paraphrased).

The courts generally only focus on one factor to decide if they have jurisdiction. To demonstrate, in *Hicks*, 825 F.2d at 120, the Sixth Circuit denied the appellee's motion to dismiss for lack of jurisdiction because the appellant, who had lost on partial summary judgment below, dismissed his sole remaining claim with the court's approval. In *James v. Price Stern Sloan*, 283 F.3d 1064, 1066 (9th Cir. 2002), the Ninth Circuit found jurisdiction when the appellant, like Perry, dismissed remaining state-law claims because "absent a stipulation [that the statute of limitations is tolled, appellant] assumes the risk that…the claim will be barred by the statute of limitations." *See also Fletcher v. Gagosian*, 604 F.2d 637 (9th Cir. 1979) ({}).

Applying the "practical-prejudice" test here, the factors test favors Perry. First, the lower court approved Perry's motion to dismiss her state-law claim. Second, the remaining claim, being a state-law negligence claim, is subject to the statute of limitations. Third, although Perry was the losing party, she is not using delay tactics. *See* R. 19 ("[S]o she may immediately appeal the [c]ourt's decision…"). Fourth, Perry has not refiled her claim. Fifth and sixth, Perry dismissed her non-adjudicated claim in one fell swoop and her claims—federal ADA

claim and state-law negligence—are not closely related in fact or law. Therefore, even under a "practical-prejudice" test and accompanying factors test, this Court should find appellate jurisdiction.

3. This Court Should Not Adopt the *Ryan* Rule as it is Against Long-Standing Supreme Court Precedent and Sound Public Policy.

Finally, this Court should not adopt *Ryan*. *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 (5th Cir. 1978) ({}). The *Ryan* rule is a complete bar to appellate review for any smidgen of manufactured finality—no matter the reason. *See* Shah, *supra*, at 52. The Second, Fifth, Tenth, and Eleventh Circuits generally follow *Ryan*. *Id*.

But in recent years adherence to *Ryan* is in doubt. The Fifth and Eleventh Circuits have not strictly adhered to *Ryan*. *See e.g., Schoenfeld v. Babbit*, 168 F.3d 1257 (11th Cir. 1999) (allowing review even though claims were **voluntarily dismissed without prejudice**); *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516 (5th Cir. 2010) (same). Recently, the Fifth Circuit sitting *en banc* found jurisdiction when the plaintiffs, after partially losing on summary judgment, voluntarily dismissed the remaining defendants to seek appellate review. *Williams v. Taylor Seidenbach*, Inc., 958 F.3d 341, 344 (5th Cir.2020). The dissent

acknowledged that whether to allow manufactured finality is now an open question amongst the originators of the great jurisdictional wall. *Id*. at 372. ({}). Adherence to *Ryan* thus remains in doubt.

In any case, the *Ryan* rule goes against long-standing Supreme Court precedent. For over eighty years, the Court has taken a practical approach when determining what is a final decision. *Cobbledick*, 309 U.S. at 326 {}). In *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962), the Court re-affirmed *Cobbledick* and stated that the Court historically takes "a practical [approach] for what is" a final decision. (Citations omitted); *see also Rederi A/B Disa v. Cunard S.S. Co.*, 389 U.S. 852, 854, (1967) ({}) (citation omitted). The practical approach to "finality has been considered essential to the achievement of the "just, speedy, and inexpensive determination of every action," a touchstone of federal procedure. *Brown Shoe Co.*, 370 U.S. at 306; *see also Cold Metal Process Co. v. United Co.*, 351 U.S. 453, 455 (1956) ("[Interlocutory appeals meet] the needs and problems of modern judicial administration by adjusting the unit for appeal to fit multiple claims actions…"). *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017) aligns with this well-established precedent.

Microsoft, which did not reach the question at issue here, reaffirmed that the final-judgment rule "is to be given a practical rather than technical construction." *Microsoft Corp*., 137 S. Ct. at 1712 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (citation omitted)). Practical construction has meant "resisting efforts to stretch § 1291 that would" create repeated appeals on the same issue or litigation by small increments. *Id*. *See e.g*., *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 112 (2009). In *Microsoft*, the issue before the Court was whether voluntary dismissal of the underlying claim creates finality to appeal Fed R. Civ. P. 23(f)—class-certification—denial. 137 S. Ct. at 1706. Applying the practical approach, while also relying on Rule 23(f), the Court concluded "that [the] voluntary-dismissal device…does not support appellate jurisdiction of prejudgment orders denying **class certification**," and held that the circuit court lacked jurisdiction to review an order denying class certification. *Id*. at 1704, 1715. (Emphasis added).

Importantly, although *Microsoft* may seem like the jurisdictional issue here, recent case law shows that the Supreme Court decides manufactured finality or piecemeal appeals on a case-by-case basis. In a

string of recent cases, the Court found jurisdiction even though issues remained in the district court. *See e.g., Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) (9-0 decision) (**bankruptcy**); ({}); ({}). On the other hand, the Court has swung the other way and disallowed jurisdiction. *See e.g.*, *Mohawk Indus.*, 558 U.S. 100 (2009) (9-0 decision) (**attorney-client privilege**); ({}). *Microsoft* therefore cannot extend here because the Supreme Court has not definitively decided whether dismissing a state-law peripheral claim creates finality for appellate jurisdiction under § 1291.

Furthermore, many public policy reasons support a practical approach. *See e.g.*, Shah, *supra*, at 47. A flexible final decision rule "may prevent hasty" settlement decisions. *Id*. *See also* Pierre H. Bergeron & Bruce A. Khula, *The Future of Discretionary Appellate Review*, 31 APP. PRAC. 3 (2012) ({}). For the lower courts, limited manufactured finality reduces docket sizes, conserves judicial resources, and leads to clearer guidance from the appellate court. Shah, *supra*, at 47, 47 n. 21. For circuit courts, manufactured finality increases substantive results. *Id*. at 47, 47 n. 22. *See also* Howard B. Eisenberg and Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time*

to Change the Rules, 1 J. APP. PRAC. & PROCESS 285, 287 (1999) (increases meaningful appeals). {}.

Applicant Details

First Name	**Tyler**
Middle Initial	**K**
Last Name	**Shappee**
Citizenship Status	**U. S. Citizen**
Email Address	**tyshappee@gmail.com**
Address	**Address** Street **2216 E Ruby Ln** City **Phoenix** State/Territory **Arizona** Zip **85024** Country **United States**
Contact Phone Number	**6027992668**

Applicant Education

BA/BS From	**Grand Canyon University**
Date of BA/BS	**May 2016**
JD/LLB From	**Arizona State University College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=80302&yr=2011**
Date of JD/LLB	**May 6, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Law Journal for Social Justice**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Berch, Jessica
Jessica.Berch@asu.edu
Botello, Ana
ana_botello@fd.org
Weinstein-Tull, Justin
justinwt@asu.edu
480-965-3229

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Tyler Shappee | 2741 S. Buchanan St. | Arlington, VA 22206 | (602) 799-2668 | tshappee@asu.edu

August 5, 2023

The Honorable Kimberly Swank
U.S. District Court for the Eastern District of North Carolina
201 South Evans St., Rm 209
Greenville, NC 27858

Dear Judge Swank:

I am a second-year student at the Sandra Day O'Connor College of Law at Arizona State University. I wish to apply for a clerkship in your chambers for the 2024-2025 term because I want to work in public service, especially at the federal level, and I know a clerkship in your chambers would be an invaluable preparation for this type of career.

When I applied to law school, I knew I was interested in clerking at the federal level, but I solidified that interest after externing in Judge Rayes' chambers. The externship allowed me to work closely with the judge and the career law clerk and to experience the work of chambers firsthand. After spending a semester in chambers, I know how tightknit the working environment is. This is a rare environment and is exactly what I want to be a part of.

I believe that I am the right fit for your chambers because I have the skills and experiences necessary to meaningfully contribute from the start. In Judge Rayes' chambers I wrote bench memoranda for civil cases on topics including personal jurisdiction, choice of law, and arbitration. I had a semester to receive and implement federal district court specific constructive feedback that would allow me to produce high quality work more easily. In addition, I drafted multiple complex sentencing memorandums while at the Federal Public Defender's Office. By the time of the clerkship, I will have had experiences working in two federal executive departments. Lastly, in addition to my legal internships, I have five years of professional work experience leading students and managing employees that I believe have prepared me to be a mature and professional addition to chambers.

You will be receiving letters of reference on my behalf from Professors Justin Weinstein-Tull and Jessica Berch, as well as from Ana Botello, my supervising attorney at the Federal Public Defender's Office. I am available for an interview at your convenience. Thank you for your time and consideration.

Respectfully,

Tyler Shappee

Tyler Shappee

2741 S. Buchanan St. | Arlington, VA 22206 | (602) 799-2668 | tshappee@asu.edu

EDUCATION

Sandra Day O'Connor College of Law, Arizona State University
Juris Doctor candidate — May 2024
GPA: 3.90 Rank: Top 10% (20/283)

Honors: Distinguished Oral Advocate (Legal Advocacy)
Willard H. Pedrick Scholar

Activities: Articles Editor for the Law Journal For Social Justice
Teaching Assistant for Civil Procedure I (Prof. Berch)
Teaching Assistant for Constitutional Law (Prof. Weinstein-Tull)
International Rule of Law & Security Fellow

Fuller Theological Seminary, Phoenix, AZ
MA, Theology, (44 credits completed) — Aug. 2018 - Dec. 2020

Grand Canyon University, Phoenix, AZ
BA, Christian Studies — May 2016
GPA: 3.97, *summa cum laude*

EXPERIENCE

U.S. Department of Justice, Human Rights & Special Prosecutions, Washington, DC — Fall 2023
Intern

U.S. Department of State, Office of the Legal Adviser, Washington, DC — Summer 2023
Intern
Working for the Office of African and Near Eastern Affairs and the Office of Management.

U.S. District Court for the District of Arizona — Fall 2022
Judicial Extern to the Honorable Douglas L. Rayes
Conducted extensive legal research in order to write draft orders for a motion to compel arbitration and a combined motion to dismiss and for judicial notice.

Federal Public Defender's Office for the District of Arizona, Trial Unit — Summer 2022
Intern
Drafted multiple sentencing memorandums and a motion for early termination of supervised release with minimal edits. Participated in client interviews, federal hearings, trial preparation, and trial.

Brilliance LED, Phoenix, AZ — June 2017 - Aug. 2021
Operations Manager
Oversaw all facets of daily operations. Developed and implemented processes company-wide. Provided extensive communication with customers and vendors through email and phone.

Paradise Valley Unified School District, Pinnacle High School, Phoenix, AZ — Aug. 2016 - May 2017
Spanish Teacher
Instructed, assessed, and managed roster of 180 students for Spanish 1-2 and 3-4.

OTHER SKILLS/ACTIVITIES
Basic proficiency in Spanish, international traveler, dog lover, fan of Marvel comics & movies, history and world religions buff

Arizona State University

Unofficial Transcript

Name: **Tyler Kyle Shappee**
Student ID: **1205874159**

Print Date: 06/04/2023
External Degrees
Grand Canyon University
Bachelor of Science 04/01/2016

Beginning of Undergraduate Record

Print Date: 06/04/2023
External Degrees
Grand Canyon University
Bachelor of Science 04/01/2016

Beginning of Law Record

2021 Fall

Course	Description	Attempted	Earned	Grade	Points
LAW 515	**Contracts**	4.000	4.000	A	16.000
LAW 517	**Torts**	4.000	4.000	A	16.000
LAW 518	**Civil Procedure**	4.000	4.000	A	16.000
LAW 519	**Legal Method and Writing**	3.000	3.000	B+	9.999

			Attempted	Earned	Points
Term GPA:	3.87	Term Totals	15.000	15.000	57.999
Cum GPA:	3.87	Cum Totals	15.000	15.000	57.999

2022 Spring

Course	Description	Attempted	Earned	Grade	Points
LAW 516	**Criminal Law**	3.000	3.000	A-	11.001
LAW 522	**Constitutional Law**	3.000	3.000	A+	12.999
LAW 523	**Property**	4.000	4.000	A	16.000
LAW 524	**Legal Advocacy**	2.000	2.000	A	8.000
LAW 638	**Professional Responsibility**	3.000	3.000	A-	11.001

			Attempted	Earned	Points
Term GPA:	3.93	Term Totals	15.000	15.000	59.001
Cum GPA:	3.90	Cum Totals	30.000	30.000	117.000

2022 Fall

Course	Description	Attempted	Earned	Grade	Points
LAW 605	**Evidence**	3.000	3.000	A	12.000
LAW 615	**Public International Law**	3.000	3.000	B+	9.999
LAW 623	**Fourteenth Amendment**	3.000	3.000	A+	12.999
LAW 735	**Teaching Assistant**	2.000	2.000	P	0.000
LAW 785	**Externship**	3.000	3.000	P	0.000

			Attempted	Earned	Points
Term GPA:	3.89	Term Totals	14.000	14.000	34.998
Cum GPA:	3.90	Cum Totals	44.000	44.000	151.998

2023 Spring

Course	Description	Attempted	Earned	Grade	Points
LAW 604	**Criminal Procedure**	3.000	3.000	A	12.000
LAW 609	**Administrative Law**	3.000	3.000	A	12.000
LAW 691	**Seminar**	2.000	2.000	A-	7.334
Course Topic:	Congress and the Courts				
LAW 691	**Seminar**	2.000	2.000	P	0.000
Course Topic:	North American Trade Law				
LAW 735	**Teaching Assistant**	2.000	2.000	P	0.000
LAW 791	**Seminar**	3.000	3.000	B+	9.999
Course Topic:	Int'l Law of Armed Conflict				

			Attempted	Earned	Points
Term GPA:	3.76	Term Totals	15.000	15.000	41.333
Cum GPA:	3.87	Cum Totals	59.000	59.000	193.331

2023 Fall

Course	Description	Attempted	Earned	Grade	Points
LAW 601	**Antitrust Law**	3.000	0.000	NR	0.000
LAW 641	**Foreign Relations Law**	2.000	0.000	NR	0.000
LAW 691	**Seminar**	2.000	0.000	NR	0.000
Course Topic:	Comp Constitutions and Rights				
LAW 706	**Immigration Law**	3.000	0.000	NR	0.000
LAW 768	**Intl Business Transactions**	3.000	0.000	NR	0.000
LAW 791	**Seminar**	3.000	0.000	NR	0.000
Course Topic:	US and Int'l Election Law				

			Attempted	Earned	Points
Term GPA:	0.00	Term Totals	0.000	0.000	0.000
Cum GPA:	3.87	Cum Totals	59.000	59.000	193.331

END OF TRANSCRIPT

Sandra Day O'Connor College of Law
Arizona State University

Justin Weinstein-Tull
Associate Professor of Law

111 E. Taylor St.
Phoenix, AZ 85004
480-965-3229
justinwt@asu.edu

May 30, 2023

Re: Tyler Shappee

Dear Judge,

I write to recommend Tyler Shappee, a rising 3L at the Sandra Day O'Connor College of Law, for a clerkship in your chambers. I do so with the greatest enthusiasm and without any reservation. Tyler is a brilliant and responsible student who is a pleasure to work with. He has been a very, very top student of mine (receiving two A+'s) through two challenging courses, and he has been a TA for me as well. He is in the top 10% of his class. He will be a stellar clerk, and any judge who hires him will be thrilled that they did.

By way of context, Tyler was a student in both my Constitutional Law and Fourteenth Amendment classes. Constitutional Law is a required 1L course that covers the fundamentals of constitutional interpretation as well as the principles, doctrines, and theories of federalism and the separation of powers. In studying federalism, we cover Congress's authority to enact legislation pursuant to its Commerce, Tax, and Spending powers, as well as restrictions on federal control of states. In studying the separation of powers, we cover the appointment and removal powers, the executive's power of the sword, among other things.

Fourteenth Amendment is an upper-level course where students learn the law of the Equal Protection and Due Process Clauses. We begin with the passage of the Amendment after the Civil War and proceed through the legal decisions and social movements that interpreted it and brought it to life. Students learn the law of race and sex discrimination, the law of privacy (including abortion and marriage equality), and the law governing the enforcement of the Amendment. The course navigates many difficult and sensitive issues, and the students learn to discuss them in informed and rational ways.

Tyler received one of the highest numerical scores in both his Constitutional Law and Fourteenth Amendment classes, receiving an A+ in both. I don't think I've *ever*

had a student get multiple A+'s in my classes. In classes of 80 students, getting an A+ is an extraordinary achievement. It means turning in an exam that is clearly written, well-organized, and substantively perfect. In both classes, Tyler caught everything I threw at him on the final – including both doctrinal and more conceptual questions.

Tyler's class participation was also excellent. He was always prepared for class and elevated class discussion when he spoke. Because the topic was constitutional law, it inevitably covered difficult and sensitive issues. Tyler navigated those issues in kind, calm, and rational ways.

Tyler's level-headedness in class is consistent with my own interactions with him outside of class as well. I got to know Tyler as a TA for my Constitutional Law class. He is an extremely responsible student and human being. He is mature, even-tempered, and committed – no surprise, having received an "A" in almost every class he's taken.

I strongly recommend that you hire Tyler.

Please feel free to contact me anytime.

Sincerely,

Justin Weinstein-Tull

(Cell: 541-968-3153)

FEDERAL PUBLIC DEFENDER
District of Arizona
850 W. Adams, Suite 201
Phoenix, Arizona 85007

JON M. SANDS
Federal Public Defender

602-382-2700
(Fax) 602-382-2800
1-800-758-7053

June 8, 2023

Dear Judge :

I am providing this letter of recommendation on behalf of Tyler Shappee for a clerkship position in your chambers. I got to know Tyler well as his supervising attorney during his twelve-week internship with our office the summer of 2022. He is the kind of intern I hope for—easy to get along with and produced timely, high-quality work throughout his summer with us.

Tyler is an excellent writer. He approached each new assignment with a positive attitude and intellectual curiosity, and I can confidently say that he would be an asset to any chambers. Though he was presented with novel issues and difficult assignments, he would take the initiative to seek out references and provide in-depth analysis with minimal guidance. He was always eager to receive constructive criticism and returned his edits in a timely manner. Overall, Tyler always delivered impressive work-product. For example, he was tasked with writing a sentencing memorandum for a case where judges typically sentence defendants to lifetime supervised release. Tyler's research and comparison to similarly situated defendants in other districts resulted in a sentence that was below the sentencing guideline recommendation, a true win for our client.

Furthermore, Tyler is mature and a joy to be around, important qualities for the work setting of chambers. I had the opportunity to spend time with Tyler, along with his fellow interns, during walks to court, drives to prison visits, and office gatherings. Tyler can navigate discussing controversial legal topics as well as lighthearted small talk. During visits to our clients in prison, a difficult environment, he handled the new setting easily and was able to show our clients the empathy and attention they deserve.

Finally, Tyler is a true team player and worked well with his fellow interns and the other attorneys in the office. During his time, he successfully worked on both individual and collaborative projects. At the end of the summer the interns provided a presentation that the attorneys could attend for CLE credit. Tyler collaborated with his fellow interns to create and deliver a seamless presentation on recent Ninth Circuit opinions on warrants. Individually, he worked he was assigned a motion for termination of supervised release by another attorney. This motion required him interviewing the client on the telephone alone in order to obtain the appropriate information.

In short, Tyler brings not only a positive attitude each day, but also a quality of work that I believe would make him an exceptional clerk. I would be happy to answer any questions that you may have.

Sincerely,

Ana Botello, AFPD, Law Student Supervisor

Sandra Day O'Connor College of Law
Arizona State University

Justin Weinstein-Tull
Associate Professor of Law

111 E. Taylor St.
Phoenix, AZ 85004
480-965-3229
justinwt@asu.edu

May 30, 2023

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Tyler received one of the highest numerical scores in both his Constitutional Law and Fourteenth Amendment classes, receiving an A+ in both. I don't think I've *ever*

had a student get multiple A+'s in my classes. In classes of 80 students, getting an A+ is an extraordinary achievement. It means turning in an exam that is clearly written, well-organized, and substantively perfect. In both classes, Tyler caught everything I threw at him on the final – including both doctrinal and more conceptual questions.

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I strongly recommend that you hire Tyler.

Please feel free to contact me anytime.

Sincerely,

Justin Weinstein-Tull

(Cell: 541-968-3153)

Writing Sample

The following is a draft order on a motion to dismiss that I wrote while externing for Judge Rayes in the Fall of 2022. The sample reflects my own work, and the sample is being provided with permission from chambers. At chambers request, party names, case numbers, and other case-identifying information have been replaced with fictitious alternatives.

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

eConnect Incorporated and Jason Thompson, Plaintiffs, v. Christopher Thompson CPA Incorporated, Defendant.	No. CV-22-00ABC-PHX-DLR **ORDER**

Before the Court are Defendant Christopher Thompson CPA Incorporated's motion to dismiss for lack of personal jurisdiction and failure to state a claim, (Doc. 20), and accompanying motion for judicial notice, (Doc. 21.) The motions are fully briefed. (Docs. 26, 27, 30, 31.) For the following reasons, Defendant's motion to dismiss is denied and the motion for judicial notice is granted.[1]

I. Background

Plaintiff Jason Thompson ("Jason") is an Arizona resident and Plaintiff eConnect Incorporated ("eConnect") is an Arizona corporation. (Doc. 15 ¶¶ 1-2.) Jason is an officer, director, and shareholder of eConnect. (*Id.* ¶ 8.) Around 2008, eConnect developed and maintained proprietary software to help homeowners' associations collect delinquent dues and assessments. (*Id.* ¶ 13.) Later, Jason created iLogistics, LLC ("iLogistics") and is a

[1] Plaintiffs' request for oral argument is denied because the issues are adequately briefed and oral argument will not assist the Court in resolving the pending motion. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

member along with non-party Chester Moller. (*Id.* ¶¶ 9-10.) eConnect owned the software but licensed it to iLogistics. (*Id.* ¶¶ 14-15.)

Defendant is an Ohio corporation. (*Id.* ¶ 3.) From 2009 to 2017, Defendant provided tax services for iLogistics and Plaintiffs. (*Id.* ¶ 18.) Jason's now-deceased father, Christopher Thompson ("Christopher"), was Defendant's sole shareholder, director, and officer, and he performed the accounting services from Ohio free of charge. (*Id.* ¶¶ 21, 26.) Unknown to Plaintiffs, in 2012 Defendant began capitalizing the development costs for eConnect's software on iLogistic's tax returns, which made the software an asset of iLogistics. (*Id.* ¶¶ 36-37.)

In 2016, Moller sued Jason in Arizona state court and used the tax returns prepared by Defendant to prove that iLogistics, not eConnect, owned the software. (*Id.* ¶¶ 38-39.) During that lawsuit, Christopher was deposed and admitted to erroneously capitalizing the software to iLogistics. (*Id.* ¶¶ 41-43.) Plaintiffs then settled with Moller in January 2020 for more than $2,000,000. (*Id.* ¶ 52.) Now, Plaintiffs bring claims against Defendant, seeking to hold it vicariously liable for Christopher's breach of fiduciary duty (*Id.* ¶¶ 56-60) and accounting malpractice (*Id.* ¶¶ 61-68).

II. Judicial Notice

Defendant requests the Court to take judicial notice of four exhibits (Docs. 20-2, 20-3, 20-5, 20-6.) It asserts that the exhibits are filings from the prior underlying suit and a government issued death certificate. Plaintiffs only object to the judicial notice of Doc. 20-5 because they dispute the facts and conclusions contained within. The Court may take judicial notice of public records without converting a motion to dismiss into one for summary judgment. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). However, the Court may not take judicial notice of a fact that is subject to reasonable dispute. *Id.*; Fed. R. Evid. 201. Therefore the Court will take judicial notice of all four exhibits.

The one document that Plaintiffs contest consists of factual findings of the Receiver's Report. The Court will take judicial notice of the existence of the report because it is beyond reasonable dispute that the report was issued and contained these factual

findings. To the extent Plaintiffs reasonably dispute the truth or validity of the factual findings in the order, the Court judicially notices only the fact that the report was issued and contained certain findings and conclusions. The Court does not take as true the findings and conclusions contained therein.

III. Personal Jurisdiction

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(2), a party may move to dismiss claims against it for lack of personal jurisdiction. In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing jurisdiction is proper. *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015). "Where, as here, a defendant's motion to dismiss is based on a written record and no evidentiary hearing is held, the plaintiff need only make a prima facie showing of jurisdictional facts." *Id.* (internal quotations and citation omitted). Although a plaintiff cannot "simply rest on the bare allegations of its complaint," *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977), uncontroverted allegations in the complaint must be taken as true and any conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor, *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

B. Analysis

"Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits." *Id.* Arizona's long-arm statute allows Arizona courts to exercise personal jurisdiction to the maximum extent permitted under the Due Process Clause of the United States Constitution. *See* Ariz. R. Civ. P. 4.2(a); *A. Uberti and C. v. Leonardo*, 892 P.2d 1354, 1358 (Ariz. 1995). Due process requires that the defendant "have certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945) (internal

quotations and citation omitted).

"Depending on the strength of those contacts, there are two forms that personal jurisdiction may take: general and specific." *Picot*, 780 F.3d at 1211. General personal jurisdiction over a nonresident defendant requires "continuous corporate operations within a state so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Int'l Shoe Co.*, 326 U.S. at 318. Conversely, specific personal jurisdiction exists when a lawsuit arises out of, or is related to, the defendant's contacts with the forum. *Helicopteros Nacionales de Colo., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). Plaintiffs argue only for specific personal jurisdiction.

To establish specific personal jurisdiction, a plaintiff must show: (1) the nonresident defendant purposefully directed[2] his activities at the forum, (2) the claim arises out of the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable. *Schwarzenegger*, 374 F.3d at 802. The plaintiff bears the burden on the first two prongs and a failure to satisfy either of these prongs means that personal jurisdiction is not established in the forum state. *Id.* But "[i]f the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable." *Id.* (internal quotations and citation omitted). Specific personal jurisdiction over Defendant is proper because Plaintiffs have satisfied the first two prongs and Defendant has not demonstrated that the Court's exercise of jurisdiction would be unreasonable.

1. Purposeful Direction

Purposeful direction requires the defendant to have "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017). "[R]andom, fortuitous, or attenuated contacts are insufficient to create the requisite connection with the forum." *Id.* (internal quotations and citation omitted). But

[2] For claims sounding in tort, as Plaintiffs' do, courts apply the purposeful direction test. *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017).

actions may still be directed at the forum state even if they occurred elsewhere. *Id.*

Defendant purposely directed its activities at Arizona. First, Defendant committed an intentional act when it performed tax services for Plaintiffs, specifically filing their state tax returns. Multiple district courts have held that performing accounting services and filing tax returns satisfies the intentional act prong of the purposeful direction test. *See*, *e.g.*, *Forty Niner Truck Plaza, Inc. v. Shank*, No. CIV. S-11-0860-FCD/DAD, 2011 WL 2710400, at *5 (E.D. Cal. July 11, 2011); *Wang v. Kahn*, No. 20-CV-08033-LHK, 2022 WL 36105, at *17 (N.D. Cal. Jan. 4, 2022). Second, Defendant expressly aimed its intentional acts at Arizona by filing Plaintiffs' state taxes here. Lastly, Plaintiffs are Arizona residents, so Defendant should have known that the harm from its alleged negligence would be suffered primarily in Arizona.

2. Claims Arise Out of Forum-Related Activities

Plaintiffs' claims arise out of Defendant's contacts with Arizona. A claim arises out of a defendant's contacts with the forum when the claim would not have arisen "but for" the defendant's actions directed toward the forum state. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998). Here, Defendant's contacts with Arizona consist, in part, of tax services performed for Plaintiffs and iLogistics and the alleged negligence occurred while performing these tax services. But for Defendant filing taxes in Arizona on behalf of Plaintiffs and iLogistics, Plaintiffs would not have suffered the harm alleged.

3. Reasonableness of Exercising Jurisdiction

Because Defendant purposely directed its actions at this forum and Plaintiffs' claims arise out of those forum-related contacts, the Court may exercise specific personal jurisdiction unless Defendant demonstrates that it would be unreasonable to do so. In evaluating the reasonableness of exercising jurisdiction, the Court applies a seven-factor balancing test that weighs:

> (1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the

> forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp., 905 F.3d 597, 607 (9th Cir. 2018).

On balance, these factors do not weigh against the exercise of personal jurisdiction. First, although Defendant is and always has been an Ohio corporation that mainly provides services in Ohio, Defendant purposefully interjected itself into Arizona's affairs by providing tax filing services in Arizona for Arizona residents. Second, though litigating this matter might be relatively more burdensome for Defendant than litigating in Ohio, "[u]nless such inconvenience is so great as to constitute a deprivation of due process, [this factor] will not overcome clear justifications for the exercise of jurisdiction." *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991) (internal quotations and citation omitted). Defendant has not shown that the inconvenience of litigating in Arizona rises to this level. Third, Defendant has not persuaded the Court that exercising personal jurisdiction will conflict to any significant extent with Ohio's sovereign interest (if any) in the matter. Fourth, Arizona has a strong interest in adjudicating this action because states have a "manifest interest in providing an effective means of reparation for its residents tortiously injured by others." *Lake v. Lake*, 817 F.2d 1416, 1423 (9th Cir. 1987). Fifth, Arizona is the best locale to ensure efficient judicial resolution of the controversy; both Plaintiffs, most witnesses, and records relating to the claims are located in Arizona. (Doc. 26 at 9.) Sixth, Plaintiffs have a strong interest in litigating in their home state of Arizona, which provides Plaintiffs an avenue to potentially recover for the claims raised. Finally, the seventh factor is relevant only following a showing that the forum state is an unreasonable forum, a showing Defendant has not made based on the first six factors. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1080 (9th Cir. 2011). Because Defendant has not made a compelling case that exercising jurisdiction would be unreasonable, the Court finds that it has specific personal jurisdiction over Defendant.

IV. Failure to State a Claim

A. Legal Standard

When analyzing a complaint for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid dismissal, the complaint must plead sufficient facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

B. Analysis

Defendant argues that Plaintiffs fail to state a claim for two reasons: (1) the claims are time-barred and (2) a principal cannot be held vicariously liable for the torts of its agent unless the agent is joined as a defendant, something Plaintiffs did not do.

1. Statute of Limitations

As a preliminary matter, however, the parties disagree over which state's law applies. Defendant argues that Ohio law applies, while Plaintiffs argue for Arizona law. Under Ohio law, these claims have a four-year statute of limitations, OHIO REV. CODE ANN. § 2305.09(D) (West 2014), and there is no application of the discovery rule, *Investors REIT One v. Jacobs*, 546 N.E.2d 206, 211 (Ohio 1989). Under Arizona law, there is a two-year statute of limitations, *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 7 P.3d 979, 981-82 (Ariz. Ct. App. 2000), and an application of the discovery rule, *Gust, Rosenfeld & Henderson v. Prudential Life Ins. Co. of Am.*, 898 P.2d 964, 966 (Ariz. 1995). This issue is important to resolve because the outcome is different under Ohio and Arizona law.

A federal court sitting in diversity applies the forum state's choice-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Arizona uses the Restatement (Second) of Conflict of Laws (1988) to determine the controlling law for

statutes of limitations. *Jackson v. Chandler*, 61 P.3d 17, 19 (Ariz. 2003).

> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) The forum will apply its own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Restatement § 142 (1988); *Jackson*, 61 P.3d at 19. "The general rule is very clear: as a starting point, the forum's statute of limitations applies." *Id.* (internal quotations and citation omitted). The claims would be timed barred in Ohio but not in Arizona. Therefore, because Arizona is the forum and it would permit the claim, it will be permitted unless the Court determines Arizona has no substantial interest in the action. The injury occurred in Arizona and Arizona has a significant interest in deterring wrongful conduct. *Id.* at 21. Arizona has a substantial interest in permitting the present action in this forum especially because Plaintiffs are Arizona residents. Because Arizona is the forum and has a substantial interest, its law applies to determine if Plaintiffs' claims are time-barred.

Statutes of limitations "identify the outer limits of the period of time within which an action may be brought to seek redress or to otherwise enforce legal rights created by the legislature or at common law." *Porter v. Spader*, 239 P.3d 743, 746 (Ariz. Ct. App. 2010). They serve primarily "to protect defendants and courts from stale claims where plaintiffs have slept on their rights *Gust*, 898 P.2d at 964, and also protect defendants from insecurity, *Porter*, 239 P.3d at 746. But "[o]ne does not sleep on his or her rights with respect to an unknown cause of action." *Doe v. Roe*, 955 P.2d 951, 960 (Ariz. 1998). Accordingly, Arizona applies the "discovery rule" to determine a claim's accrual date. *Gust*, 898 P.2d at 966. "Under the 'discovery rule,' a plaintiff's cause of action does not accrue until the

plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Id.*

In professional malpractice cases, a cause of action does not accrue until the plaintiff discovers the negligence and sustains ascertainable harm as a result of that negligence. *CDT, Inc.*, 7 P.3d at 982 (internal quotations and citation omitted). "[N]egligence that results in no immediate harm or damage delays accrual of the cause of action until such damage is sustained." *Id.* at 982 (internal quotations and citation omitted). The damage must be "more than merely the threat of future harm." *Id.* (internal quotations and citation omitted). "Harm is actual and appreciable when it becomes irremediable [or] irrevocable." *Com. Union Ins. Co. v. Lewis and Roca*, 902 P.2d 1354, 1358 (internal quotations and citation omitted).

Here, the statute of limitations is two years for these claims. *CDT, Inc.*, 7 P.3d at 981-82. Defendant argues that Plaintiffs' claims are time-barred because Plaintiffs knew or should have known of the alleged negligence more than two years before they filed their complaint in January 2022. Defendant believes that Plaintiffs should have known of the negligence in 2016 when the underlying suit with Moller commenced, or in 2017 when Christopher admitted to erroneously capitalizing the software to iLogistics during his deposition. Plaintiffs respond that, although they were aware of the negligence at those times, their claims did accrue until they settled the underlying suit in January 2020 because that is when they suffered appreciable harm.

The Court agrees with Plaintiffs. Although Plaintiffs knew or should have known of the negligence by 2017 at the latest, Plaintiffs had not suffered appreciable harm at that time. Before Plaintiffs settled the underlying suit, any potential harm caused by Defendant's alleged negligence was not irremediable or irrevocable. For example, the underlying suit could have been voluntarily dismissed or resolved in Plaintiffs' favor. The mere possibility of harm resulting from Defendant's alleged negligence was not enough to start the limitations clock.[3] Because Plaintiffs did not suffer appreciable, non-speculative

[3] Defendant counters that Plaintiffs suffered appreciable harm in 2016 when they hired an attorney to defend the underlying suit. But Arizona caselaw appears to reject this

harm until January 2020, their claims are timely.

2. Vicarious Liability

Defendant argues that in order to hold a principal vicariously liable for the acts of an agent, the agent must be joined as a party to the suit—something Plaintiffs did not do. Again, the parties disagree over which states' law applies. However, for this issue the choice of law is moot because the result is the same under both Ohio and Arizona law. In order to hold a principal vicariously liable for the torts of an agent, a plaintiff must prove that the agent was negligent, but it is not necessary to name the agent as a defendant. *Huffman v. American Family Mut. Ins. Co.*, 2011 WL 814957, at *2 (D. Ariz. 2011); *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 913 N.E.2d 939, 944 (Ohio 2009); *see also McClure v. Country Life Ins. Co.*, 326 F. Supp. 3d 934, 948 (D. Ariz. 2018) (noting that the entire case against the employer was premised on vicarious liability, even though the individual employees who engaged in the malfeasance were not named as defendants); Accordingly, although Plaintiffs will need to establish Christopher's negligence in order to prove their case against Defendant, their failure to join him (or, more accurately, his estate) as a defendant does not warrant dismissal under Arizona or Ohio law.[4]

IT IS ORDERED that Defendant's motion to dismiss (Doc. 20) is **DENIED** and that Defendant's motion for judicial notice (Doc. 20) is **GRANTED**.

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view. *See Myers v. Wood*, 850 P.2d 672 (Ariz. Ct. App. 1992) (holding that deciding not to bring an earlier $1,000 claim for attorney fees did not bar a later $400,000 malpractice claim); *Enterprising Sol., Inc. v. Ellis*, No. 1 CA-CV 14-0355, 2015 WL 4748020 (Ariz. Ct. App. 2015 Aug. 11, 2015) (following the holding of *Myers* under comparable circumstances).

[4] Courts should resolve tort issues under the law of the state having the most significant relationship to both the occurrence and the parties with respect to any issue. Restatement § 145(1). Relevant considerations include "(1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, (4) the place where the relationship, if any, between the parties is centered." *Id.* § 145(2). Ultimately, "[t]hese contacts are to be evaluated according to their *relative importance* with respect to the particular issue." *Id.* (emphasis added).
In this case, the factors are evenly divided between Arizona and Ohio. Therefore, the Court is unable to determine which factors to weigh more importantly because there was not adequate attention on the "relative importance" of these factors by the parties. Fortunately, the choice of law issue for the statute of limitations and vicarious liability were resolved on different grounds. Therefore, nothing in this order resolves the choice of law issue in regard to the merits of this case.

Applicant Details

First Name	**Yekaterina**
Last Name	**Shrayber**
Citizenship Status	**U. S. Citizen**
Email Address	**yekaterina.shrayber@lls.edu**
Address	**Address** Street **1710 N Fuller Ave, Apt 429** City **Los Angeles** State/Territory **California** Zip **90046**
Contact Phone Number	**4156238540**

Applicant Education

BA/BS From	**University of California-Santa Cruz**
Date of BA/BS	**June 2018**
JD/LLB From	**Loyola Law School** **http://www.lls.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Loyola of Los Angeles International and Comparative Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**